

EXHIBIT

1

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA
3

4 In re: CATHODE RAY TUBE (CRT))
5 ANTITRUST LITIGATION)
6) Case No.
7) 07-5944SC
8) MDL No. 1917
9)
10 _____)
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12 REPORTER'S TRANSCRIPT OF PROCEEDINGS
13

14 Tuesday, March 20, 2012
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16 Location:
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(none)

1 SAN FRANCISCO, CALIFORNIA; TUESDAY, MARCH 20, 2012

2 9:54 A.M.

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4 PROCEEDINGS

5 HON. CHARLES LEGGE: Okay, I guess the important
6 parties are here. All right. Welcome.

7 I won't call for appearances here this morning
8 because I think there are just a certain number of you
9 who will do the speaking. So when you do speak, please
10 give your identification to the court reporter, and
11 that's all the appearances we'll note.

12 If at the end of the hearing you do want your
13 appearance to be noted on the record, you can give your
14 card to the court reporter.

15 I understand our two principal speakers are
16 located here in the middle. If you want the podium, you
17 can slide the podium down and stand and talk if it's more
18 comfortable, or you can stay where you are in your seats.

19 (Phone interruption.)

20 (Discussion off the record.)

21 HON. CHARLES LEGGE: All right. Good morning.
22 We're here in the matter of Cathode Ray Tube Antitrust
23 litigation for the hearing on the defendants' joint
24 motion for summary judgment.

25 We're not calling for appearances here, but if

1 you're on the telephone and wish to have your appearance
2 noted, you can speak to the court reporter at a later
3 time.

4 Now, this is a motion, and I'm turning to the
5 proposed form of order by the defendants jointly for
6 summary judgment against the purported direct purchaser
7 plaintiffs who did not purchase CRTs.

8 This negligence has attracted a great deal of
9 paper, and I have read your briefs. I've read some of
10 the cases. I haven't read all of them yet. No, I've
11 not. But I think I'm sufficiently familiar with your
12 arguments and points to engage in a meaningful
13 discussion.

14 Mr. Kessler, I assume you're going to be
15 speaking on behalf of the defendants?

16 MR. KESSLER: I will, your Honor.

17 HON. CHARLES LEGGE: Okay, before you speak let
18 me raise a few points with your side of the table, and
19 that is, as I read what you're saying, what you're asking
20 for is an order that applies to all of the plaintiffs who
21 did not actually purchase a Cathode Ray Tube. Not a
22 product obtaining Cathode Ray Tube but didn't purchase --
23 didn't purchase a Cathode Ray tube. And I think what
24 you're looking for is what I would call a blanket order
25 applying to all members of the claimed class and not just

1 to the few who were named in the -- in the complaint
2 itself as being named plaintiffs.

3 And the effect I believe would really be to turn
4 this action, a direct action, to essentially an indirect
5 action except for the manufacturers who actually bought
6 CRTs and maybe a few other people who bought CRT, for
7 inventory or repair, or something like that, and that
8 we'd be taking TV sales and monitor sales out of the
9 case. Really that's the question. Would that have the
10 effect of taking TV sales and monitor sales totally out
11 of this case.

12 Another question is, are you asking for any
13 relief in the direct actions? We had a voluminous brief
14 from the direct action plaintiffs, but I don't see
15 that your motion itself is directed at that. The motion
16 had implications for it, yes, I'm sure it does, but I
17 just don't know whether I consider the separate positions
18 of the direct action plaintiffs in this particular
19 motion.

20 Now, another question, and I think from your
21 briefing you do accept the fact that Judge Illston's
22 decisions in the LCD case are contrary to what your
23 position is here.

24 And I gather from the briefing you're really not
25 attempting to distinguish but you're just saying that she

1 was wrong in what she did, but in doing that and
2 recommending that, I recommend to Judge Conti to do
3 something different. You realize that you'll be creating
4 a split on the substantive issue of law here in this one
5 instance, which is rather significant. So I think as you
6 interpret it, you're asking for really quite a lot in one
7 motion.

8 But looking at the motion, it seems to me your
9 essential point is simple. And that is that the fixed
10 price product for purposes of this motion, I'm assuming
11 price fixing, I'm assuming things that we don't have to
12 repeat alleged all the time, the price fixed product in
13 this case is a CRT, that is a Cathode Ray Tube, and it's
14 not a product containing a CRT. And any plaintiff who
15 didn't purchase a CRT, fixed price or not from anybody,
16 just simply has no standing, is not a plaintiff in the
17 case to complain about the price of CRTs.

18 Now, I think the point is well made and simply
19 made, and I think that's the essence of it. The problems
20 are if that that's true, then what about Judge Illston's
21 decision do we just simply say it's incorrect and
22 recommend that Judge Conti take a position that is
23 opposed to hers and what do we do about sugar and what do
24 we do about line report.

25 One other thing I think bears on this and I

1 can't quite put it all together, is in this stipulation
2 and order last August concerning finished products,
3 operative paragraph number three, that the plaintiffs
4 withdrew their CRT finished products claims conspiracy
5 claims provided however that the issue of the possible
6 impact or effect of the alleged fixing of prices in CRTs
7 on the prices of finished products shall remain in the
8 case. I'm a little puzzled by that language comparing
9 with this motion, and besides that, who would have the
10 right to complain about the price of a finished product
11 in this case.

12 Okay. Those are thoughts, and that explains to
13 you or implies to you the extent of the preparation or
14 knowledge that I have now before me. So go ahead with
15 your presentation.

16 MR. KESSLER: Thank you, your Honor, and I will
17 address each of those points in the course of my
18 argument. Let me start out though first about the
19 procedural context in which we face at this moment.

20 The motion we have filed is directed at the
21 eight individual plaintiffs where it is undisputed that
22 they purchased a product other than a CRT itself. We are
23 seeking summary judgment solely against those eight
24 plaintiffs. Your decision will obviously, on the legal
25 issue, set a precedent within the case, but we are not

1 moving at this time against the DAP complaint because the
2 time for doing that hasn't be even arisen yet. But we
3 certainly would move against a DAP complaint on the same
4 ground, but it is not technically before your Honor on
5 this motion since the time to file such a motion --

6 HON. CHARLES LEGGE: Okay, but with respect to
7 this case, you're not seeking a blanket order?

8 MR. KESSLER: I am not, your Honor.

9 HON. CHARLES LEGGE: Against the plaintiff class
10 as a whole?

11 MR. KESSLER: No, your Honor.

12 HON. CHARLES LEGGE: You're seeking an order
13 only as to the eight that are named in the complaint?

14 MR. KESSLER: That's all I could do procedurally
15 because there's no class certified. The only import of
16 your Honor's order would be to dismiss these eight
17 plaintiffs, and, of course, it would set a precedent, you
18 know, which obviously we would rely upon in the future
19 either against in a motion against the DAPs, or if there
20 was a motion to certify a class, we would obviously argue
21 the class should not include people who did not purchase
22 CITs because they would be indirect purchasers. And as
23 your Honor noted, the consequence may be that the
24 indirect purchase of plaintiffs may choose to amend their
25 class definition to encompass people who would be

1 indirect. We don't know. That would be up to them, and
2 we'd have to see what transpired.

3 But the -- the order we're asking you to issue,
4 while it's very important, is actually very narrow. So
5 that's what I would say to start out.

6 HON. CHARLES LEGGE: Now, wait a minute. By
7 doing that are you implying that in any later motion
8 you're going to have to have a factual basis as to
9 particular plaintiffs who did or did not purchase a CRT?

10 MR. KESSLER: I think the way it would work out
11 is the following, if I may, your Honor.

12 HON. CHARLES LEGGE: Yes.

13 MR. KESSLER: If you were to grant a motion, if
14 on the DAP cases, for example, on the face of those
15 complaints I believe they -- many of them state that they
16 purchased only CRT televisions. If, in fact, it wasn't
17 clear from the face of complaint, we'd probably have to
18 do the same interrogatories, you know, or discovery that
19 we did in this motion where it was confirmed as to
20 whether or not they purchased any CRTs themselves.

21 It's possible, for example, as your Honor said,
22 for repair purposes, even a retailer purchased, a certain
23 number of CRTs directly from a defendant in which case
24 for repair purposes they might be in.

25 So, yes, there could be factual issues, although

1 I think it would be very simple to resolve with an
2 interrogatory, and we would know which is in and which is
3 out.

4 With respect to the class, I think it would get
5 resolved in the motion for class certification, though we
6 would simply argue that the class should be limited to
7 those in a direct purchaser case who qualifies as direct
8 purchases, it would be purchases of CRTs.

9 So this would be cited as a precedent if we won
10 this in terms of how the class should be properly
11 defined. So I don't think --

12 HON. CHARLES LEGGE: Well, I'm a little confused
13 as to what the class now is in our direct case. The
14 definition that's been in the complaint appears in
15 paragraph 85, all persons or entities who between certain
16 dates that purchased a CRT product in the United States
17 from any defendant, et cetera, et cetera.

18 I guess in view of the stipulation of August of
19 '11 that we have to substitute CRT or CRT product.

20 MR. KESSLER: Certainly if our motion is
21 granted, I think you would give the class counsel an
22 opportunity to restate at some point what their class
23 they were seeking to still represent. But you're right,
24 at the moment the complaint is based on the original
25 allegations of the complaint.

1 Also I have to correct something I said. It's
2 nine of the 13 named direct plaintiffs who have conceded
3 that they did not purchase a CRT. I said eight, and I
4 just made an error about that, for which I apologize.

5 So --

6 HON. CHARLES LEGGE: Let's go back to where we
7 have to go. For purposes of this motion and any order by
8 me on this motion, it concerns the nine named plaintiffs
9 who have, on the record, one way or the other, pleadings
10 or discovery --

11 MR. KESSLER: Correct.

12 HON. CHARLES LEGGE: -- established that they
13 did not purchase a CRT but only purchased a CRT product.

14 MR. KESSLER: Right. So you would be
15 granting --

16 HON. CHARLES LEGGE: You have, lurking out
17 there, the entire class. We have lurking out there the
18 direct action plaintiffs. So whatever I or Judge Conti
19 ends up saying about this, Judge Conti obviously being
20 the final decider, we have to be concerned about the
21 precedent --

22 MR. KESSLER: I agree with that, your Honor.

23 HON. CHARLES LEGGE: I appreciate that.

24 MR. KESSLER: What you literally would be doing
25 is granting the summary judgment against the claims of

1 the nine individuals, and that would be the import of the
2 order.

3 HON. CHARLES LEGGE: I appreciate that.

4 MR. KESSLER: So, as I said, this is important
5 but narrow.

6 Let me also explain why it is narrow for a
7 number of other reasons. First of all, we're limiting it
8 again to the plaintiffs who there's no dispute did not
9 purchase the price fixed product. The allegedly priced
10 fixed product, the CRT, so that's the only named
11 plaintiffs we are seeking to dismiss on this motion.

12 No. 2, and this does make this case different
13 from some of the other cases, even different in some ways
14 from Judge Illston's case, as I will talk in a little
15 while. We have a stipulation here that there could be no
16 claim under any circumstances that there was a conspiracy
17 to fix the price with respect to the finished products.

18 HON. CHARLES LEGGE: Yeah.

19 MR. KESSLER: And I believe you could actually,
20 if your honor is more comfortable, limit your ruling in
21 the context of a case which has that particular
22 stipulation in other cases, and we'll get to this. For
23 example, I'll come back to this in Linderboard. It turns
24 out there were direct allegations that the prices of the
25 finished product were also subject to the price fixing

1 conspiracy. So you had other elements in some of these
2 other cases that distinguished it from this particular
3 case which makes it narrow based on facts where we know
4 the only claim can be that the conspiracy related to the
5 CRTs as opposed to the television or the monitors.

6 The next thing that I believe makes this narrow
7 is that we believe your Honor can either take judicial
8 notice of the fact or accept it as undisputed, because I
9 believe it is undisputed, or follow it from your prior
10 opinions, which note the fact that a television and a
11 monitor is a different product, obviously, from a CRT.
12 It's going to be whatever the market is. It's going to
13 be a different market. I don't think there could be any
14 dispute about that.

15 Obviously people who buy televisions, especially
16 the plaintiffs here, are in a different market from
17 manufacturers who buy CRTs or even from a retailer who
18 buys it for the purposes of doing repairs. It's a
19 different product in a different market that whatever it
20 is subject to a different array of market forces, and
21 that's going to become important. Doesn't matter what
22 the forces are. It just matters that they're not the
23 same.

24 And we know here that there's no allegation that
25 other purchases of CRTs are in any conspiracy. So we

1 know we have people like HP and Dell or Apple or others
2 who purchased CRTs for monitors who were unrelated or not
3 in any conspiracy would be out there competing with
4 respect to the finished product. We know that Sony
5 television, Sharp, Visio, others would be out there
6 competing in a different market with respect to the
7 televisions.

8 So, your Honor, could take notice of the fact
9 simply that the market forces are going to be different.

10 I also will note, your Honor, that the -- that
11 it's already been stated by the plaintiffs' counsel that
12 this would have to be an issue that would be proven in
13 the case for them to prevail. And this isn't surprising,
14 because Illinois Brick and Hanover Shoe are really cases
15 under Section 4 of the clank (phonetic) net and have to
16 do with the need for any private plaintiff to show what
17 the impact is. You can't escape that impact requirement.

18 And I'm reading now from the transcript of the
19 Rule 118 motion when your Honor was questioning counsel
20 for plaintiff and the Court noted what if a manufacturer
21 buys a higher priced tube but decides to absorb the
22 increased cost itself without increasing its product.
23 The answer of plaintiffs' counsel is then we'll find out
24 how much of that is in discovery and we'll see what that
25 impact is, but we don't know that now.

1 That's very important. We don't know that now.

2 The Court: That's impact, isn't it.

3 Plaintiffs' counsel: It is, but it's not all
4 the impact. It may be one percent of the impact. Or it
5 may be ten percent of the impact. Or it may be 50
6 percent of the impact.

7 The point of this, your Honor, is that that type
8 of proof, which would actually be required under Section
9 4 if this case were allowed to go forward, runs head on
10 into what Hanover Shoe said should not be done, what
11 Illinois Brick said should not be done, what UtiliCorp
12 said should not be done, and what the Ninth Circuit --
13 and this is very important, the Ninth Circuit in Delaware
14 Valley said should not be done.

15 That's why when your Honor said this may create
16 a conflict with Judge Illston, it may or may not because
17 of the stipulation issue.

18 But putting that aside, Judge Illston's decision
19 is in conflict, we believe, with Delaware Valley and has
20 Ninth Circuit controlling law. And ultimately I think
21 what your Honor should be recommending to Judge Conti is
22 that Judge Conti needs to be guided by Ninth Circuit law
23 in Delaware Valley in terms of the bright line rules of
24 Illinois Brick and Hanover Shoe and UtiliCorp.

25 And the fact that you don't create case-by-case

1 exceptions based on specific facts of particular markets
2 as to whether or not the policies of Illinois Brick apply
3 or not. That that itself, that case-by-case analysis
4 would add so much to the complexity of an antitrust
5 litigation that what the federal courts have done through
6 the Supreme Court and Ninth Circuit through Delaware
7 Valley say we understand this isn't ideal, and some
8 people who are injured may not be able to recover. But
9 we believe this is the right result for federal antitrust
10 laws.

11 And I will note from the plaintiffs' standpoint
12 this may just make them indirect plaintiffs as opposed to
13 direct plaintiffs. So it's not clear that, you know,
14 that they are out or in; it's a question of where do they
15 properly belong. Is the indirect case going to be
16 bigger? Is the direct case going to be smaller? That's
17 really what you're facing here.

18 But let me read a particular passage of Illinois
19 Brick, because I think this goes right to our concern on
20 pass on.

21 What it says, and this is on 431 US 720, and
22 what it says is a wide range of factors influence a
23 company's pricing policies. Normally the impact of a
24 single change in the relevant conditions cannot be
25 measured after the fact. Indeed a businessman may be

1 unable to state whether had one fact been different, a
2 single supply less expensive, general economic conditions
3 more buoyant, or the labor market tighter, for example,
4 he would have chosen a different price.

5 Equally difficult to determine in the real
6 economic world rather than an economist hypothetical
7 model is what effect a change in a company's price will
8 have on its total sales.

9 Finally, costs per unit for different volume of
10 total sales are hard to estimate. Even if it could be
11 shown that the buyer raised his price in response to in
12 the amount of the overcharge and that his margin of
13 profit and total sales had not thereafter declined, there
14 would remain the nearly insuperable difficulty of
15 demonstrating that the particular plaintiff would not
16 have or would not have raised his prices absent the
17 overcharge or maintained the higher price had the
18 overcharge been discontinued.

19 This goes on and on.

20 And what the Court is saying, we don't want the
21 federal courts doing that, even though it may have some
22 other impacts on other aspects of what we do under the
23 federal antitrust laws in terms of recovery.

24 We would submit there is no way that plaintiffs
25 here can go forward without having to go into precisely

1 that type of inquiry, and you see this in their
2 submission when they say they want to know what
3 percentage were related party sales, what were not
4 related party sales. They want to explore the individual
5 decisions that may have affected the impact. All these
6 other facts are not relevant to this motion. They're
7 relevant to the -- precisely the type of pass on inquiry,
8 which Hanover Shoe --

9 And I'd urge your Honor to read Hanover Shoe in
10 addition to Illinois Brick, because Illinois Brick is
11 really focusing on Hanover Shoe. And, in fact, what I
12 just read to you from Illinois Brick is mostly a quote
13 from Hanover Shoe. In other words, they're taking -- the
14 idea is that it's the Hanover Shoe principles which led
15 to this concern about the pass on, even if it wouldn't
16 work out exactly the way we wanted it to.

17 Now, the Ninth Circuit in Delaware Valley, okay,
18 picks this up completely, and that's why I think this is
19 very important.

20 What the Ninth Circuit says, and this is after
21 UtiliCorp, the Supreme Court case we reaffirmed that we
22 don't want to go case by case in creating exceptions to
23 Illinois Brick. The Ninth Circuit said it's a bright
24 line rule for Illinois Brick. And what it does is the
25 Ninth Circuit follows what the Supreme Court did in

1 Utilicorp, and here is what the Ninth Circuit said.

2 In sum, even assuming that any economic
3 assumptions underlying the Illinois Brick rule might be
4 disproved in a specific case, we think it is an
5 unwarranted and counterproductive exercise to litigate a
6 series of exceptions having stated the rule in Hanover
7 Shoe and adhere to it in Illinois Brick. We stand by
8 interpretation of Section 4.

9 Now, what that is, that's the Ninth Circuit
10 quoting UtiliCorp in the Supreme Court and then saying
11 that, therefore, we're not gonna look at different facts.

12 And now I'm looking at the Ninth Circuit
13 decision at 523 Fed Second 1116, and what they say is
14 that appellants fail to persuade this Court that there is
15 anything extraordinary about the facts of this case
16 warranting a deviation from the firmly established
17 Illinois Brick rule.

18 They then point out, they make an argument as to
19 why, you know, it would be easy to calculate the
20 overcharge or wouldn't be a problem here or why it would
21 serve the purposes. And this is what the Ninth Circuit
22 says. The Supreme Court has already rejected a similar
23 argument, see UtiliCorp, you know.

24 And so that's where we believe the Ninth Circuit
25 is. That's where we believe the Supreme Court is. And

1 that's why we believe that's where this Court and Judge
2 Conti should be.

3 Now, what do they say in response, because they
4 do make some arguments in response to this, and your
5 Honor raised some of this in his questioning too. So let
6 me address that.

7 The first thing they say in response is, well,
8 we don't have to prove pass-on. Okay. We could just
9 assume pass-on. And they cite Royal Printing for this
10 idea.

11 Basically you think about what they're arguing,
12 your Honor. They're arguing is that somehow they can
13 avoid the entire requirements of Section 4 of the Clayton
14 Act and not show any pass-on alone. What we would say
15 about that --

16 HON. CHARLES LEGGE: By pass-on, you're talking
17 about literally passing on the higher price of the
18 price-fixed product that became a component in the
19 packaged product?

20 MR. KESSLER: Right.

21 They're saying, just assume that they should
22 just be able to say we'll approve that CRT prices were
23 increased X percent and just assume that that increase
24 made its way into a television or a monitor regardless of
25 market conditions, regardless of what Sony did or Sanyo

1 did or Sharp did, regardless of what HP did or anyone
2 else, and regardless of the very clear stipulation.
3 That's why I come to the stipulation which says, and
4 we're not going to allege there was any conspiracy at all
5 among the defendants with regard to that finished product
6 price.

7 HON. CHARLES LEGGE: But in this case it's been
8 reserved that the issue of the possible impact or effect
9 of the alleged fixing of prices of CRTs on the finished
10 products remains in the case?

11 MR. KESSLER: Yes, it remains in the case, your
12 Honor, for now, consideration on this motion.

13 In other words, if we're right on this motion,
14 okay, then Illinois Brick precludes that evidence and
15 that proof. Okay. We're either right or we're wrong.

16 We obviously couldn't get them to stipulate that
17 we're right about Illinois Brick, that Illinois Brick was
18 not at issue in this stipulation. If we're wrong, then,
19 yes, what they will have to do is not what they've
20 argued, is just presume that there will be an impact, and
21 that's -- that's what I'm getting at here. They would
22 have to prove that impact. They'd have to prove it for
23 each individual plaintiff. They would have to deal with
24 that issue as a matter of class certification with
25 respect to what that impact would be, very much like an

1 indirect case where those issues come up in indirect
2 cases all the time where your Honor knows you have to
3 prove the pass-on and whether or not it could be done on
4 a class basis or not on a class basis, how much, and, you
5 know, how would you do that.

6 Those issues will be in this case, as the stip
7 says, unless we're right. As a matter of law, your Honor
8 can't do it.

9 So I think the significance of that sentence in
10 the stip is it means they're gonna have to prove that
11 here, unless as a matter of law the courts have taken
12 that inquiry away from the federal courts, that's what I
13 believe is referenced and is the significance of the stip
14 in that issue.

15 I do think it's significant because it means
16 that it was never contemplated. They just could argue
17 that the impact is presumed or that impact automatically
18 follows, which is the only way I see they could get by
19 Illinois Brick.

20 Now, with respect to the -- this is important,
21 is the Ninth Circuit cases regarding umbrella damages.
22 And the reason this is important is not because they're
23 seeking umbrella damages. We know they're not seeking
24 umbrella damages. The reason they're important is those
25 cases, as do all the umbrella cases, go through the fact

1 that the reason the Court won't allow umbrella damages,
2 which, your Honor, would be damages suffered from
3 companies who were not conspirators but the idea being
4 because someone else is conspiring, they add an umbrella
5 so they could add a higher price.

6 The reason that's not allowed, the Courts say,
7 is because Illinois Brick policy says don't allow that
8 type of proof of -- in effect, it's another variation of
9 pass-on in a different way. Saying, well, the
10 non-conspirators would follow the conspiracy, and no one
11 knows what they would do in those market forces. So they
12 specifically cite Illinois Brick and Hanover Shoe, and
13 they say we don't allow that type of proof because that's
14 what would have to happen here for televisions. It's
15 what would have to happen here for monitors.

16 Now, they also make the argument, your Honor,
17 about the fact that there are a lot of sales, they claim,
18 to either related parties or affiliated parties or the
19 same party. I think it's mostly related parties that
20 somehow that changes the analysis they argue, because for
21 those related party sales, they say, well, the related
22 party wouldn't be expected to sue because they are
23 related and that the turns would be lost with respect to
24 those sales. So I think we have to address that
25 argument.

1 Does that argument offset the general
2 prohibition against proving pass-on getting into these
3 economic complexities what that would do, and our answer
4 is it does not for several different reasons.

5 First of all, the Supreme Court has made it
6 clear that the main focus here is the economic
7 complexity, and the pass-on issues even at the expense --
8 and they say this in UtiliCorp, if sometimes people who
9 were injured can't recover under the federal antitrust
10 laws, they say that directly and completely in UtiliCorp;
11 the Ninth Circuit says it in Delaware Valley.

12 No. 2, obviously there are direct purchasers who
13 will be able to pursue and provide a direct purchase of
14 function. Whether it's HP or Dell or Sony or Sharp or
15 Visio, there are plenty of people who can sue to provide
16 a deterrence function as private plaintiffs.

17 And, third, the consequence here may be that
18 they move into indirect plaintiff status. It doesn't
19 mean that the claims necessarily go away.

20 So it's not at all clear that there is in that
21 deterrence factor here as well. So looking at that
22 situation, we don't see how any concern about not having
23 deterrence because of these particular plaintiffs may not
24 have a direct claim anymore says let them prove pass-on,
25 let's go in those complexities, than it does in other

1 cases.

2 I also will note the following. This related
3 party issue is something of a -- of an illusion, and I'll
4 explain it the following way.

5 If the parties are so related that they are like
6 a division, you know, of the company and in effect
7 they're totally under control, then there's really no
8 economic transaction, as we pointed out. In other words,
9 there was no CRT price to fix. I mean, think of it, for
10 example, if it was just part of the company; if it wasn't
11 related. Well, then, it's just there is no price
12 internally necessarily in a division. It would just be,
13 well, that's the cost of manufacturing. There's no
14 fixing of a price from any Sherman Act significant. So
15 there's nothing to deter.

16 If their argument is, well, wait a minute, this
17 was a related party, you know, who is, you know, who was
18 independent joint venture, something else, well, then,
19 it's no different than anyone else. In other words,
20 there's no conspiracy about the finish product prices.
21 That related party would be expected to charge a TV price
22 or a monitor price that would reflect the market forces
23 it faced from its competitors with there being no
24 conspiracy.

25 You would have to have exactly the very

1 difficult analysis that Hanover Shoe and Illinois Brick
2 says you didn't do. Try to figure out in their head,
3 well, how much of the price was determined by quote the
4 price fix.

5 So, to me, it's one or the other. Either
6 they're so controlled that there's no economic
7 significance to the transaction from an antitrust
8 standpoint, in which case there's nothing to deter, or
9 they're sufficiently independent that, of course, without
10 any agreement to fixed prices on the finished products,
11 you can't just assume impact, which is what they're
12 trying to do.

13 They cite Royal Printing, and what was
14 significant in Royal Printing is that it was the same
15 product. So basically what they ended up saying there is
16 that, well, if it's this exact same product, says -- and
17 Royal Printing was controlled by the defendants, in
18 effect one of the conspirators in that case controlled
19 them. So if it's the same product, if the price has
20 already been increased, we'll assume it's the same price.
21 But that's completely different when you have different
22 products in another market with different products. And
23 this is way beyond just saying, well, it's the same
24 product. It's a controlled company. So assume it's --
25 assume it's the pass-on.

1 That's the fallacy for trying to rely on Royal
2 Printing. And Royal Printing does not discuss that at
3 all because it was the same product. It wasn't there
4 with respect to that.

5 Same thing in Freeman. They cite the Freeman
6 case. The Freeman case allowed you to go forward with
7 respect to people who bought from a real estate
8 association real estate services. It was the same
9 services, just a group of competitors who formed an
10 entity who then sold to services. And they conspired to
11 fix whatever the prices of the services of the entity and
12 the exact same service was passed on. There wasn't any
13 issue of transforming a different product with different
14 market forces.

15 So I don't believe either Freeman or Royal
16 Printing is of any help to them.

17 HON. CHARLES LEGGE: Well, in Royal Printing
18 don't you have a fact there that the plaintiffs actually
19 purchased some of the price-fixed product?

20 MR. KESSLER: Well, they had that as well, yes.
21 They actually purchased some of that as well. But I'm
22 saying even to the extent there's dictor beyond that,
23 yes, your Honor, they did have that as well, which is
24 another distinction.

25 But I think to the extent Royal Printing

1 indicates even when they purchased a non-price fixed
2 product says it's the same product. It's always the same
3 product. In other words, that's the key point, your
4 Honor. It wasn't a product in a different market. It
5 wasn't a product with different competitors. It wasn't a
6 product with different forces, which is what creates the
7 problem.

8 What we believe of the on-point cases here are
9 the cases we cited: Stanislaus, the tin can case versus
10 -- the tin cans versus the tin case, which talks about
11 the fact that had the -- there were a couple of issues in
12 that case, but it spoke about the fact that had they
13 purchased from a co-conspirator the cans, it would have
14 been in different markets with different market forces.

15 The compressor case and the refrigerators where
16 they said you can't -- and in that case specifically
17 refused to follow Linderboard and Sugar, in specific.
18 I'm going to talk about those cases. And they said
19 that's not the law of the Sixth Circuit, for example.
20 That's the case said in compressors, which is where that
21 case was. Same as is not the law of the Ninth Circuit in
22 our view with respect to Linderboard and Sugar.

23 And they said you can't sue just for buying a
24 compressor and just buying a refrigerator as opposed to
25 buying a compressor. The same right here in this

1 district when your Honor says, well, there's a conflict
2 in the district. Well, right here in the ODD case, okay,
3 we believe the decision in ODD indicated you couldn't
4 just buy an ODD device as opposed to an ODD on exactly
5 this issue. And it's dismissed.

6 Now there's no motions to dismiss pending an ODD
7 again. There's another round of briefing, and there will
8 be another round of decisions. But in the existing
9 decision in ODD the Court did not have a problem with
10 saying you've got to buy the ODD not buy the ODD devices
11 even though in that case there was an allegation that
12 there was an ODD conspiracy, just like there was
13 originally in this case. But what the Court did was
14 dismissed it under Trombley (phonetic) for not being
15 sufficiently well pled with respect to that.
16 That was the import of that series of ODD rulings.

17 So we think the cases that have looked at this
18 other than Judge Illston here have, in fact, you know,
19 not felt that they suggested, nor this transformation.

20 Now, one of the things the plaintiff may say,
21 well, CRT is a big part of the television, and they may
22 argue that we think it would have had an impact here.
23 Well, maybe they're right; maybe they're wrong. But
24 that's what UtiliCorp and Delaware Valley say you don't
25 do. In other words, you don't do a case-by-case factual

1 analysis to say, well, in this case was there pass-on or
2 not pass-on. It was that's not the issue before your
3 Honor. Maybe they could prove pass-on. Maybe they
4 couldn't prove pass-on. Okay, that's not the point.

5 The point is you're not supposed to have a trial
6 on the issue of the pass-ons. So the fact that -- and
7 this shows why you can't presume it just presume it.

8 Look for example at the refrigerator case. So
9 in the refrigerator compressor case, the compressors are
10 a very small part of the refrigerator. It's a small
11 part. It -- it could be a \$2000 refrigerator, \$30
12 compressor. Very, very small part. And the point of
13 that is you don't do a case-by-case analysis. So you
14 couldn't have a rule that said as they argue, well, if
15 you bought from a related party, just assume the impact
16 went down. How would you ever do that in a refrigerator.
17 You'd assume if a compressor went up two dollars, it
18 affected a \$2000 refrigerator? You would never make that
19 assumption. They would have to prove it.

20 Now, they would say it's easier to prove it over
21 here for televisions. That's not the point. The point
22 here is that we don't go through. That's what Illinois
23 Brick, UtiliCorp, Delaware Valley say. You don't go by
24 case by case trying to prove in this case I can't show
25 the pass-on, in this case I can't show the pass-on, in

1 this case it's easy, in this case it's hard.

2 What the Ninth Circuit said is bright line rule.
3 Now, that brings me to Sugar, Linerboard, and Judge
4 Illston's decision.

5 So why do we say your Honor should not follow
6 Judge Illston. Judge Illston, in all due respect for
7 Judge Illston, did not discuss any of these issues. You
8 should follow Judge Illston's decision if it's
9 persuasive. It's not binding obviously. It's a
10 sister-court decision, but it's not binding on Judge
11 Conti any more than the decision in ODD is binding on
12 Judge Conti, which is also in the northern district.

13 What is binding on Judge Conti is Delaware
14 Valley or UtiliCorp or Illinois Brick or Hanover Shoe.
15 That clearly is binding on Judge Conti with respect to
16 that.

17 So with respect to Judge Illston's decision,
18 it's really a question, is it persuasive. When you look
19 at Judge Illston's decision, with all due respect,
20 there's no analysis of these issues. She doesn't
21 consider at any length this issue of different markets,
22 different competitors, transformed products. How do you
23 address those issues. She just doesn't consider it.

24 No. 2, she cites, I believe, Linderboard and
25 Sugar, but she doesn't explain why she thinks that

1 overcomes Delaware Valley. She doesn't discuss Delaware
2 Valley. She doesn't discuss the bright line rule.
3 There's just no persuasive analysis, I believe, to
4 convince this Court that it makes sense for the Ninth
5 Circuit to adopt that type of a ruling.

6 The plaintiffs have also argued that Judge Conti
7 somehow adopted this in his opinion accepting your
8 recommendation decision. Your Honor, I believe you know
9 that at the time of that decision, none of these issues
10 were squarely presented to Judge Conti, because he did
11 that in the context of your Honor's decision, which
12 pointed out that they were alleging a conspiracy for
13 finished the products at the time.

14 He does cite, you know, in one short paragraph
15 he does cite, I believe, either Linerboard or Sugar,
16 maybe both, I think it was Linerboard. But I also will
17 note he doesn't even discuss Illinois Brick in that
18 paragraph, or Hanover Shoe.

19 So I don't think Judge Conti has in any way
20 thought over the issues in this context, because when
21 your Honor ruled, they were not before your Honor in that
22 context, and your Honor didn't give them any
23 recommendations with respect to that context. So I don't
24 think that is in any way --

25 I think this is an open issue in this case

1 certainly regarding that.

2 So that gets us to Sugar and Linerboard. What I
3 would say is the following: Sugar, okay, specifically
4 acknowledges that it was saying, well, let's -- let the
5 plaintiffs prove how much impact there was. And they say
6 it could be difficult in some cases, could be easier in
7 other cases. That's the Sugar analysis.

8 Frankly, there's no way to square that with
9 Utah. Utah came later as a Supreme Court case. I don't
10 think there's any way to square with Illinois Brick and
11 Hanover Shoe, but there's certainly no way to square that
12 with Utah regarding that or Delaware Valley.

13 That leaves Linerboard, which was after Utah.
14 And what I would say about Linerboard is it can't be
15 overlooked the fact that Linerboard had allegations of a
16 conspiracy regarding the finished products as well. It
17 was in the record that went up to the court of appeals.
18 Okay. There's no -- there could be no dispute about it.
19 That's what's discussed in the district court decision
20 that was being appealed, and that puts it in a different
21 context. So, again, they didn't have to face the very
22 unique -- uniquely difficult issue that your Honor faces
23 where you have a stipulation that precludes any
24 conspiracy about that, where you have a different product
25 where it's there. And we would respectfully suggest that

1 the Ninth Circuit after Delaware Valley would not follow
2 Linerboard to the extent it was meant to apply where
3 there's not an allegation of conspiracy if it's meant to
4 apply to that, and it certainly wouldn't follow Sugar
5 which is directly opposed.

6 Finally, your Honor, I just will conclude with
7 two things. One, plaintiffs make a 56(b) argument. I'm
8 not going to spend much time on that except to note all
9 of their facts they want to discover have nothing to do
10 with this issue that I'm arguing. What it has to do with
11 some of the type of facts that they would need to prove
12 pass-on which we are arguing are precluded by the Supreme
13 Court and Ninth Circuit from considering. There is no
14 dispute about the only facts that are relevant here, and,
15 therefore, your Honor, they made no 56(b) showing, and
16 the --

17 HON. CHARLES LEGGE: And the fact you consider
18 important is that they did not purchase a CRT from
19 anybody?

20 MR. KESSLER: That's the only -- the only fact.

21 HON. CHARLES LEGGE: You think that's the only
22 fact you need?

23 MR. KESSLER: Oh, and one more other thing that
24 I don't think is in dispute that a CRT is not a
25 television. They're in different markets. I don't think

1 that would be disputed about that --

2 HON. CHARLES LEGGE: Well, in this case I don't
3 think I need to make a factual inquiry at all of that
4 issue.

5 MR. KESSLER: I believe that's correct, your
6 Honor.

7 And that leaves me finally, your Honor, I would
8 just close with the following quote from UtiliCorp, and
9 this is on page 497 US. He -- I guess I can't do it that
10 way. Page 216, your Honor, what it says in the
11 following, the proceeding conclusions bring us to a
12 broader point.

13 HON. CHARLES LEGGE: Hang on a minute. Let me
14 follow you.

15 MR. KESSLER: It's 216 of UtiliCorp under D,
16 there's a heading D.

17 HON. CHARLES LEGGE: Yeah. Here we are Hanover
18 Shoe and --

19 MR. KESSLER: It says the -- the rationales
20 underlying Hanover Shoe and Illinois Brick will not apply
21 with equal force in automatic cases.

22 That's basically what plaintiffs are arguing
23 here. It doesn't apply here. We, nonetheless, believe
24 that ample justification exists for our stated decision
25 not to carve out exceptions to the direct purchaser rule

1 for particular types of markets, the possibility of
2 allowing an exception even in rather meritorious
3 circumstances would undermine the rule. And then the
4 last paragraph of D in sum even assuming that any --

5 HON. CHARLES LEGGE: Wait a minute.

6 MR. KESSLER: This is after the quote, your
7 Honor, just before point four.

8 HON. CHARLES LEGGE: Okay.

9 MR. KESSLER: In sum, even assuming that any
10 economic assumptions underlying the Illinois Brick rule
11 might be disproved in a specific case, which is basically
12 what they're arguing here, we think it is unwarranted and
13 counter productive exercise to litigate a series of
14 exceptions.

15 Your Honor, I would suggest that is the guiding
16 principle for this motion, and we respectfully urge you
17 to grant this which would have the effect of changing
18 eventually, as your Honor noted, the character of this
19 case so that it could go forward now knowing who are the
20 directs are, who might be the indirects, where people
21 fit, how classes should be looked at or not, which is one
22 of the reasons we believe it's so important to dissolve
23 this issue now because the worse issue from the
24 standpoint of case administration would be to proceed way
25 down the road in this case only to find out that the

1 classes, both the direct and indirect classes, you know,
2 have to be very different than the way in which the
3 litigation is preceding based on the allegations in the
4 complaint.

5 Thank you, your Honor.

6 HON. CHARLES LEGGE: So you do recognize that if
7 we're -- if I were to adopt your position and if Judge
8 Conti were to adopt your position, that we really would
9 be shifting a lot of the directs to the indirect
10 category.

11 MR. KESSLER: If they chose they would have to
12 redefine that class. But, yes, they would have the
13 option of redefining that class to include all those. I
14 think that's correct.

15 HON. CHARLES LEGGE: And in the present direct
16 case, damages, causation based upon TV sales, prices, or
17 monitor sales is out of the case.

18 MR. KESSLER: As a matter of law, the inquiry
19 would be precluded, is the way I would say it.

20 HON. CHARLES LEGGE: All right. I understand.

21 MR. KESSLER: Okay.

22 HON. CHARLES LEGGE: Okay. Let's take a ten
23 minute recess.

24 (Break taken.)

25 HON. CHARLES LEGGE: All right. Let's go back

1 on the record and hear next from plaintiffs' counsel.

2 You're going to be arguing.

3 MR. LEHMANN: Yes, your Honor.

4 Michael Lehmann on behalf of Housfeld, LLP.

5 We've divided up the matter in the following
6 manner. I just want to apprise your Honor.

7 HON. CHARLES LEGGE: Sure.

8 MR. LEHMANN: I represent the direct purchaser
9 class, and I will be arguing the legal points.

10 Mr. William Isaacson of Boies, Schiller will be
11 arguing be arguing the points with respect to direct
12 purchasing plaintiffs.

13 And Mr. Rick Saveri will be arguing his points
14 raised in the Rule 56(d) declaration.

15 HON. CHARLES LEGGE: All right. Now, to start
16 out do you contest that these eight or nine plaintiffs
17 did not purchase a CRT.

18 MR. LEHMANN: Your Honor, I am unaware of any
19 facts that would indicate that they purchased CRTs.

20 HON. CHARLES LEGGE: Okay.

21 MR. LEHMANN: As opposed to finished products.

22 HON. CHARLES LEGGE: So really then your
23 position is that even though with what they purchased was
24 not a CRT because the product of which the CRT is a
25 component that under the various cases you're citing that

1 is an understanding.

2 MR. LEHMANN: Our position is that where you're
3 in a situation where defendants manufacture a price-fixed
4 component and incorporate that component in a finished
5 product that they make and sell.

6 Plaintiff who only bought the finished product
7 from either the defendant itself or from a subsidiary or
8 division of the defendant has standing to sue for damages
9 under the Clayton Act for the conspiracy to fix the
10 component.

11 HON. CHARLES LEGGE: Okay. Now I'm not sure
12 whether you qualified your response. What if it's
13 purchased through a third channel, a third source?
14 Suppose the manufacturing defendant puts the price-fixed
15 product in his own TVs, TVs he's selling and sells to a
16 wholesaler.

17 MR. LEHMANN: Your Honor, if it's a situation
18 where the manufacturer sells to totally independent third
19 party, like a wholesaler, and that wholesaler in turn
20 sells to a member of an ultimate consumer or a retailer,
21 we would not contend that those purchases are within the
22 direct purchaser class.

23 HON. CHARLES LEGGE: All right. So your -- your
24 group is a purchaser from a defendant?

25 MR. LEHMANN: Right.

1 HON. CHARLES LEGGE: Or some subdivision.

2 MR. LEHMANN: Correct.

3 HON. CHARLES LEGGE: Or something of other of
4 the defendant.

5 Okay. Go ahead. Thank you.

6 MR. LEHMANN: So, your Honor, given that
7 conceptual framework, I mean, the question I ask myself
8 is why are we here arguing this motion today.

9 It's the direct purchase plaintiff's belief that
10 this issue has already been raised and decided by Judge
11 Conti. And let me explain why the principals of
12 Linerboard was argued to your Honor in opposing the
13 various motions to dismiss back in August of 2009.

14 They were also argued to Judge Conti in the
15 appeal from your Honor's report and recommendation in a
16 belief that the direct purchasers filed in February of
17 2010. In that brief they cited Linerboard. They also
18 quoted Sugar.

19 Now, your Honor, as defense counsel correctly
20 noted, did not discuss Linerboard in your recommended
21 decision. But Judge Conti did in his March 2010 opinion.
22 And I've highlighted for your Honor's benefit the portion
23 of the opinion that we rely on.

24 HON. CHARLES LEGGE: I've got it in its
25 typewritten form here.

1 MR. LEHMANN: What Judge Conti -- this is his
2 opinion affirming your decision denying the various
3 motions to dismiss. And what he said, and I'm quoting,
4 furthermore courts have found antitrust standing where
5 plaintiffs purchased downstream goods from manufacturers
6 who made an allegedly fix the price of a component of
7 those goods, and then he proceeded to site and summarize
8 the Linerboard opinion.

9 In your Honor's recommended decision on Rule 11,
10 you specifically noted that the complaint could be read
11 to allege that a conspiracy as to CRTs had an impact or
12 effect on finished products prices and that discovery as
13 to that impact or effect was appropriate.

14 And I would refer your Honor to page 14 of your
15 opinion, wooing and recommendation with respect to Rule
16 11. Again, I've highlighted --

17 HON. CHARLES LEGGE: Wait a minute. I've got
18 mine here. It's the one June of '11. Right?

19 MR. LEHMANN: Is your recommended decision on
20 docket No. 947.

21 HON. CHARLES LEGGE: Yes. What are you citing
22 then please?

23 MR. LEHMANN: I'm citing page 14 where your
24 Honor indicates that your Rule 11 determination would not
25 remove finished products from the case in their entirety

1 but would -- there could still be limited discovery
2 allowed with respect to the issue of how the conspiracy
3 as to CRTs affected the prices of finished products.

4 As we noted in our brief in the May 2011 Rule 11
5 hearing, defense counsel said -- and we quoted this in
6 our brief, it's in the transcript of the May 26, 2011,
7 hearing at 109 to 110.

8 In LCD they argued impact, okay, and they argue
9 that under the Sugar Linerboard cases they have standing
10 to sue for that. Okay. Counsel goes on. Okay. So that
11 should be doing asserting what they asserted in LCD.

12 Well, that's exactly what we did in the
13 stipulation that we eventually entered into.

14 The stipulation resolving the Rule 11 issues
15 specifically stated, quote, the issue of the possible
16 impact of effect or affect of the alleged fixing of
17 prices of CRTs on the prices of finished product shall
18 remain in the case. Clearly, if we thought by entering
19 into that stipulation the issues of finished products had
20 been eliminated from the case, why would we be
21 stipulating to allow for further discovery with respect
22 to such finished products.

23 Now, as I said defense counsel cited the LCD
24 case in the argument on the Rule 11 hearing. In LCDs
25 Judge Susan Illston, whose opinions in this case your

1 Honor has followed before, twice adopted the principles
2 of Sugar and Linerboard. She did so the first time in
3 denying a motion to dismiss for lack of standing with
4 respect to monitors and television containing LCD panels.

5 HON. CHARLES LEGGE: I've got four decisions put
6 together here.

7 MR. LEHMANN: The one I'm referring to, your
8 Honor, is 2008. It's 586 fed sub second 1109 at pages
9 1118 and 1119.

10 HON. CHARLES LEGGE: Yes.

11 MR. LEHMANN: And then in a second decision on
12 class certification she again endorsed the principles of
13 Sugar and Linerboard and certified --

14 HON. CHARLES LEGGE: That's the one.

15 MR. LEHMANN: That opinion is 267.

16 HON. CHARLES LEGGE: FRD.

17 MR. LEHMANN: FRD 291 at pages 206 and 07. He
18 certified direct purchaser plaintiff classes of purchases
19 of LCD panels and of purchasers of monitors, television
20 or mobile computers containing LCD panels. In the recent
21 LCD criminal trial against AU Electronics, Judge Illston
22 instructed the jury that the elements of defense --

23 HON. CHARLES LEGGE: I don't have it.

24 MR. LEHMANN: You don't have it because it
25 occurred just very recently.

1 That the elements of the offense included fixing
2 the price of TFT LCD panels that were incorporated into
3 finished products such as notebooks computers, desk top
4 computers, and televisions.

5 So we find ourselves in the situation where we
6 were told by the defendants, hey, why aren't you doing
7 what you did in LCDs. We proceeded by the stipulation to
8 do exactly that, and now we're told by the defendants,
9 hey, LCDs is not the law. Other judges had disagreed.

10 They site the opinion of Judge Richard Seaboard
11 (phonetic) in the optical disk drive litigation. Judge
12 Seaborg there was concerned about the situation where he
13 perceived to be a conspiracy claim with respect to ODD
14 devices, finished products containing ODDs that were sold
15 by Dell and HP. Wholesalers who were outside the
16 conspiracy.

17 But here's what he said with respect to Judge
18 Illston's opinion in LCDs. Quote, plaintiffs in this
19 case do not have a standing problem with respect to any
20 ODD devices they may have purchased directly from
21 defendants.

22 That's us. We're only arguing for devices,
23 finished product purchased directly from the defendants.
24 Not from HP. Not from Dell. Not from any third party
25 that's unaffiliated with the defendants.

1 So what have we got here. Your Honor. In
2 short, the article three judge presiding over this case
3 has stated unequivocally that Linerboard is applicable
4 here.

5 Your Honor viewed the issue of impact and effect
6 on finished products and said it wasn't affected by a
7 Rule 11 recommendation and that discovery could proceed
8 with respect to that impact.

9 The stipulation among the parties was -- simply
10 preserves the issue, and counsel for the defense said
11 that the DPPs should be following what was done in LCDs,
12 which was precisely what we did.

13 That's the overview. Let's step back and talk a
14 little bit about some of their cases.

15 Illinois Brick. It's important to consider the
16 fact situation in Illinois Brick. In Illinois Brick you
17 had allegations of a conspiracy by manufacturers of
18 concrete block to fix the prices of such block. Those
19 companies sold to independent third-party masonry
20 contractors who then resold them to independent
21 third-party general contractors who prepared bids for
22 construction projects that they then submitted to
23 plaintiffs like the State of Illinois.

24 So the case involved one product, a four-step
25 distribution change, where the two middle steps of the

1 chain were neither owned or controlled by any defendant
2 and were not accused of conspiring with any defendant.

3 The Court held that Illinois, the one who got
4 the bid, couldn't sue for damages under the Clayton Act.
5 Its reasoning was actually based on two factors. The
6 first was concern about multiple liability by different
7 groups of purchasers. And I should note in passing this
8 concern has been somewhat modified by the fact that the
9 US Supreme Court subsequently ruled that the states could
10 enact Illinois Brick repeating loss that afforded a
11 damage action to indirect purchasers to buy from our
12 cartel. So you can have a situation now where both the
13 direct purchasers and the indirect purchasers can sue for
14 damages and there is no defense that the direct
15 purchasers passed on the overcharge down the distribution
16 chain.

17 The second concern as defendants note is that
18 there might be some evidentiary complexities caused by
19 offensive use of pass-on by a plaintiff several steps
20 removed in the chain of distribution.

21 If you look at the cases that have been decided
22 after Illinois Brick, particularly the cases that we
23 sight -- Royal Printing, Sugar, Linderboard -- those
24 cases are not really focused so much on exceptions to
25 Illinois Brick as they are focused on identifying which

1 plaintiff, outside the conspiracy, bought the price-fixed
2 product in the first instance and suffered injury and,
3 therefore, should obtain recovery. Let me explain this a
4 little further.

5 Let me first take the example of Royal Printing.
6 And, again, Mr. Kessler is entirely correct, that case
7 involved a single product; that wasn't a case of a
8 component product and the finished product. But the
9 analysis of deterrents that the Ninth Circuit engaged in
10 in Royal Printing is fairly significant and I think ties
11 in with the analysis you see in Sugar and in Linerboard.

12 There you had a situation where the plaintiff
13 bought paper from a division of one defendant and the
14 subsidiary of other defendant. So you had this question,
15 well, you had this internal transfer price between the
16 manufacturer and either the subsidiary or the division,
17 how do you know how much of the over charge was passed
18 on.

19 The Ninth Circuit in Royal Printing acknowledged
20 that that was a potential issue, but what it said was
21 this, and I'm quoting at 621 Fed 2nd at 327. The only
22 alternatives are to allow royal printing to sue the
23 appellees for the entire amount of the overcharge to the
24 wholesalers or not to allow Royal Printing to sue the
25 appellees at all.

1 Because, as we have already shown, as a
2 practical matter the direct purchasers here will never
3 sue, in this context they were talking about the
4 subdivision and the subsidiary, borrowing Royal Printing
5 suit would close off every avenue for private enforcement
6 in the antitrust laws. This would be intolerable.

7 The Ninth Circuit went on to say that Royal
8 Printing could recover the full overcharge on its
9 purchase of the price-fixed products from the defendant.
10 On the same page of the opinion it said, quote, Hanover
11 Shoe teaches that in such situations there's nothing
12 wrong with the plaintiff winning a windfall gain so long
13 as the antitrust laws are vindicated and the defendant
14 does not suffer multiple liability.

15 And I note this analysis of Royal Printing has
16 been followed the Ninth Circuit as recently as 2008 in
17 Delaware Valley.

18 Now, Judge Illston in LCDs said, this deterrence
19 analysis in Royal Printing is really not all that
20 different from the deterrence analysis that the third
21 circuit undertook in Sugar and Linderboard. She said
22 that in her opinion in November 7, 2011, opinion in the
23 TFT LCD cases 2011 west law 5357906.

24 In both Sugar and Linderboard, the conspiracy
25 focused on a complete product. In each case the named

1 plaintiff bought a finished product, candy and sugar,
2 corrugated sheets in containers in Linerboard, either
3 directly or from a defendant or through a subsidiary. In
4 each case the claim was that the conspiracy as to the
5 component was said to have the intended affect of raising
6 the price of finished products.

7 Now, the defendants in their brief, and it's
8 been repeated here today, said that, well, Linerboard is
9 distinguishable because there the conspiracy covered both
10 the component and the finished product. And they cite
11 some language from the District Courts' 2001 opinion in
12 Linerboard.

13 We went back and looked at that language and
14 they had a little ellipsis in the middle of their quote,
15 and I'm going to tell you what was missing. This is from
16 In re Linerboard antitrust litigation, 203 FRD 197 203.

17 The Court said that the allegations of the case
18 were grounded on allegations -- quote, grounded on
19 allegations that defendants conspired to restrict the
20 output of Linderboard -- here comes the missing part --
21 in order to support increases in the price of Linerboard.
22 And then we go back to the text, with the objective of
23 increasing the price of corrugated sheets and corrugated
24 boxes.

25 We contend the same thing. We contend there was

1 a conspiracy to fix the prices of CRTs, and one of the
2 objectives there was that it had the effect of increasing
3 the prices of finished products by the amount of the
4 embedded overcharge.

5 And I note Judge Conti in this case, in the
6 opinion I gave to you, viewed Linerboard as a case
7 involving price fixing conspiracy with respect to
8 Linerboard.

9 So taking Sugar, which I think is the initial
10 opinion from the third circuit that addressed this topic,
11 there again, the concern was expressed by the defendants
12 in that case that if you had a situation where you tried
13 to trace the overcharge from the sugar into the candy
14 through potential multiple levels of distribution, you
15 might have additional complications.

16 The third circuit responded, however, this must
17 not be allowed to obscure the fact that the plaintiff did
18 purchase directly from the alleged violator.

19 True. The price-fixed commodity had been
20 combined with other ingredients to form a different
21 product. But such as a sugar sweetened the candy, the
22 price-fixing enhanced the profits of the candy
23 manufacturers.

24 It pointed out that the situation it had before
25 it was analogous to a situation that could have happened

1 in Illinois Brick where you had the general contractor
2 conspiring with the makers of the concrete block. And in
3 that kind of a situation the third circuit said the
4 concern which the Supreme Court expressed about the
5 proration of overcharge among the number of entities in
6 the chain would not have been threatened.

7 The third circuit went on to talk about the
8 deterrence aspect in ways very similar to the way that
9 the Ninth Circuit said about Royal Printing. Here's what
10 the third circuit said. I'm quoting from 579 fed 2nd at
11 pages 17, 18.

12 We are also influenced by the realization that
13 to deny recovery in this instance would leave a gaping
14 hole in the administration of the antitrust laws. It
15 would allow the price fixing of a basis commodity to
16 escape the reach of a treble damaged penalty simply by
17 incorporating the tainted element into another product.
18 That's the refinery who illegally set the price of sugar
19 could shield itself by putting all of the sugar into a
20 new product, syrup, simply by adding water and perhaps a
21 little flavoring.

22 We do not think the antitrust laws could be so
23 easily evaded.

24 As the Court went on in Sugar to note, there
25 would be no allocation problems in the circumstance

1 before it. Quote, plaintiff is a direct purchaser and,
2 therefore, entitled to recover the full amount of the
3 overcharge.

4 As we pointed out in our briefs, Sugar and
5 Linerboard have been cited on this point with approbation
6 or at least followed in seven cases as recently as 2010.
7 Those cases include LCDs one and two. And as you see
8 Judge Conti endorsed Linerboard in his opinion in this
9 case.

10 Now, in the LCDs cases, Judge Illston
11 specifically relied on this deterrence rationale that's
12 expressed in Sugar. 405 million dollars in settlements
13 have been paid so far to resolve direct purchaser
14 complainant components finished product claims in LCD.
15 And Toshiba, one of the defendants here, is going to
16 trial in the next month or two on both sets of claims.

17 And, your Honor, it makes absolutely no sense to
18 say that the direct purchaser plaintiffs in LCDs have
19 standing to sue for overcharges in both LCD panels and
20 monitors, televisions and laptops, but DPT's in this case
21 have standing to sue in this case only with respect to
22 CRTs and can't make any kind of claim with respect to the
23 monitors and TVs that incorporate CRTs and are sold by
24 the defendants.

25 We talked about the fact in our brief that we

1 believe that, although discovery is far from complete in
2 this topic, that perhaps as much as 60, 70, 80 percent of
3 CRTs are sold in subsidiaries or affiliated companies who
4 then incorporate them into TVs or monitors.

5 It's clear that you can't expect those
6 subsidiaries or fellow defendants or divisions to sue
7 their parents or coconspirators during this entire class
8 period March 1, 1995, November 25, 2007, no coconspirator
9 or subsidiary coconspirator has sued a co-conspirator or
10 parent entity with respect to the allegations of this
11 conspiracy.

12 Under defendants' theory of the case, these
13 sales, the ones that do these divisions, codefendants,
14 subsidiaries, there will be no direct purchaser who can
15 recover with respect to that. Judge Illston and LCDs
16 refuse to count such a result. Your Honor should resist
17 the temptation and invitation to be the first jurist in
18 this district to take an opposite view. And you ought to
19 especially resist it because Judge Conti has aligned
20 himself with Judge Illston on this topic. His language
21 following Linerboard was an independent affirmative
22 ground to deny the motions to dismiss.

23 Now, the defendants also talk in their brief and
24 in their argument today about the fact that the federal
25 antitrust laws really shouldn't be concerned with

1 intra-company transfers because they have no external
2 competitive significance, to which I say wrong. That
3 argument ignores the fact that the record to date shows
4 that defendants at the glass meetings strove to ensure
5 that the fixed CRT prices charged to third-party
6 affiliates, third-party entities, finished product
7 makers, were also charged to subsidiaries or affiliates
8 of defendants.

9 The defendants clearly did not think these
10 inter-company sales were irrelevant or significant. They
11 wanted to make sure the prices were the same in both
12 directions so the intra-corporate sales wouldn't
13 undermine the CRT conspiracy.

14 I want to talk a little bit about some of the
15 cases that defendant cite to support their position.
16 They site two case. It's UtiliCorp and Delaware Valley
17 that do not involve finished products. They cite three
18 other cases that do involve component products and
19 finished products, ODDs, the optical disk drive case,
20 Stanislaus Food Products versus Costco, and the
21 refrigerator compressor antitrust litigation. All of
22 these latter three cases are distinguishable because the
23 finished products were purchased from a non-defendant.

24 In UtiliCorp you had a situation where several
25 states filed antitrust suits on behalf of their residents

1 accusing national gas producers of conspiring to
2 infiltrate the price for gas, for utilities. The Supreme
3 Court had this to say, quote, and I'm quoting from 497 US
4 at 207, the consumers in this case have the status of
5 indirect purchasers. In the distribution chain they are
6 not the immediate buyers from the alleged antitrust
7 violators. They bought their gas from utilities, not
8 from the suppliers said to have conspired to have fixed
9 the price of gas.

10 That's the difference between that case and
11 ours.

12 In Delaware Valley various plaintiffs including
13 Bamberg County Memorial Nursing and Hospital Center
14 challenged Johnson & Johnson selling sutures and
15 endomechanical products as an unlawful.

16 Bamberg didn't buy the products directly from
17 Johnson & Johnson. It rather dealt solely with an
18 independent third-party distributor named Owens and Meyer
19 nor controlled by J&J nor alleged to be a conspirator.

20 The Ninth Circuit deemed the Illinois Brick bar
21 applicable on their facts. But those aren't our facts.

22 Defendants claim that Delaware Valley created a
23 bright line rule with respect to the finished product
24 component product situation. No. No where does Delaware
25 Valley address that situation, and nowhere does it state

1 such a rule.

2 ODDs, I've already said that Judge Seaborg in
3 ODDs agreed with us in this situation where you're
4 talking about purchases from a defendant with respect to
5 devices that contain as a component of price-fixed
6 product. His concern, as I say, was that he viewed the
7 plaintiff in this case as covering situations where the
8 purchases might be from non-defendant third parties like
9 Hewlett Packard and Dell. And he said, once again, the
10 problem --

11 I'm quoting from 2011 West Law 38944376, et
12 cetera.

13 Once again, the problem is that plaintiffs are
14 attempting to extend the price-fixing conspiracy to
15 finished products not produced by the defendants,
16 An issue not expressly addressed in Cathode Ray.

17 Well, that's not our case. We're limiting it
18 here to the purchases from the defendants with respect to
19 CRT -- price-fixed CRTs contained in the finished
20 products that they sell. Not that Circuit City sells.
21 Not that Dell sells. Not that HP sells. That's the
22 indirect purchaser case. We're talking about purchasers
23 directly from the defendant.

24 In Costco the district court held that
25 purchasers of tin cans lacked standing to sue for alleged

1 conspiracy involving the prices of tin mill products,
2 steel sheets coated with tin, which undergo multiple
3 production processes before contained.

4 The opinion has no discussion of Sugar or
5 Linerboard, no discussion of any of the opinions in LCDs.
6 The case is distinguishable because there the plaintiff
7 bought from a non-defendant who was alleged to be dealing
8 vertically with the other defendants.

9 The case is also distinguishable because we
10 contend here that when you put a CRT into a television,
11 you're not talking about multiple production steps that
12 change its character. The CRT basically remains
13 insignificantly changed when it's incorporated into the
14 product.

15 And that brings us to the compressor case. This
16 is the one reported decision that defendants have managed
17 to dredge up that questions whether Sugar and Linerboard
18 should be followed. It's distinguishable, and it also
19 has language that supports our position.

20 There you had a situation where it was alleged
21 that manufacturers of refrigerant compressors fixed the
22 prices for those products. Some of those manufacturers
23 also produced refrigerators and sold them from the
24 price-fixed compressors. The issue was whether the
25 plaintiffs who bought only the refrigerators had standing

1 to sue under the Clayton Act.

2 The District Court took the view that it was not
3 required to follow Sugar. The District Court also noted,
4 however, in its view, that Sugar might not run afoul of
5 Illinois Brick.

6 Here's what it said. Under those unique
7 circumstances, there is no pass-on theory in play. In
8 the situation presented In re Sugar, the plaintiff
9 asserting antitrust injury does not allege an offensive
10 pass-on theory at all, because the defendant at issue
11 made both the price-fixed product, sugar, and the
12 finished product containing the price-fixed product,
13 candy, and thus there was no middleman.

14 In other words, Stotter (phonetic), the
15 plaintiff in Sugar, was not asserting was not asserting a
16 pass-on theory because the defendant violated that sold
17 the candy also manufactured the price-fixed sugar. And,
18 therefore, there was no middleman and thus no issue as to
19 whether or not that middleman absorbed the overcharge for
20 the sugar.

21 I am quoting here from 795 Fed sub second and
22 pages 657 and 658.

23 The Court in the compressor case went on to note
24 at page 658 that no plaintiff had alleged that it bought
25 from a defendant any refrigerator containing an alleged

1 price-fixed compressor. As I say, that's different from
2 this case as well.

3 We've also raised in our brief and argument that
4 defendants' motion is procedurally deficient because they
5 haven't provided facts on what we think are contested
6 issues. And the types of facts we're talking about have
7 been outlined in our brief, but to give you an example,
8 defendants assert that the market for finished products
9 is different from the market for CRT and materials in
10 complex ways. We contend that although they might be
11 distinct markets, they are inextricably intertwined, and
12 the price of the CRT that's a component into the finished
13 product, has a definite effect on the finished products
14 price.

15 Defendants also assert that plaintiffs did not
16 purchase finished products from a controlled independent
17 mediary.

18 We contend that they did purchase from
19 controlled intermediaries --

20 HON. CHARLES LEGGE: If they didn't buy CRT at
21 all, what difference does that make?

22 MR. LEHMANN: I'm reading to you what they said.
23 This is an issue they raised.

24 So they've raised the issue of controlled
25 intermediaries. They assert that CRTs in the finished

1 products were plaintiffs that -- they assert that the
2 CRTs in the products that the plaintiffs bought were
3 substantially altered, and that relates back to the issue
4 in the Costco case where the Court viewed it as kind of
5 important about whether or not the component was
6 substantially altered on its way to be included in the
7 finished product.

8 We think that presents a factual issue.

9 They also assert that entities such as Hewlett
10 Packard or Dell or others purchased CRTs directly from
11 one of the defendants. There's no record to support
12 there. Maybe that's true. I assume it would be. But
13 the fact of the matter is I don't think they've
14 established it for purchases of summary judgment.

15 And so we think that each of these assertions
16 which defendants are relying on as a factual matter in
17 their motion needs support. And their answer is, well,
18 it's undisputed. Well, you can take judicial notice of
19 it. Well, what are they giving you to take judicial
20 notice of? This is a complex interaction between two
21 markets. You've got no record to rule on.

22 HON. CHARLES LEGGE: The issue is whether a
23 person, company who did not buy a CRT has standing to sue
24 in this case where the allegation is price fixing of the
25 CRT.

1 MR. LEHMANN: That's right.

2 HON. CHARLES LEGGE: I don't think any of those
3 facts are necessary for that kind of decision. That's a
4 pure question of law.

5 MR. LEHMANN: I think it's a mixed question of
6 law in fact that I would agree with your Honor that it's
7 predominantly a legal question. Certainly the question
8 of whether the Courts in this district and circuit follow
9 Sugar and Linerboard is a legal question.

10 HON. CHARLES LEGGE: Okay.

11 MR. LEHMANN: I'm finished, your Honor.

12 HON. CHARLES LEGGE: Okay.

13 MR. LEHMANN: And I'll turn the floor over to
14 Mr. Isaacson.

15 HON. CHARLES LEGGE: Okay, sir.

16 MR. ISAACSON: Thank you, your Honor, for
17 hearing from us.

18 As your Honor has said, that while the order
19 today doesn't technically imply to the direct action
20 purchasers, the effect of the order as a precedent, if
21 adopted and sustained, would drive a hole through our
22 cases and preclude the federal claims of many of the
23 direct action purchases and preclude the federal claims
24 for large parts of other purchases.

25 And to just pick up where you last spoke, your

1 Honor, is the issue here is did a person who did not buy
2 a CRT have standing. And I think the more precise
3 question is, did a person who did not buy a CRT alone
4 have standing. Because there is no issue that direct
5 purchasers of televisions and monitors from a conspiracy
6 or from conspirators or their controlled affiliates are
7 direct purchases. They directly purchased both the
8 finished product and all of the components. They are
9 also the only direct purchasers of those CRTs and
10 finished products.

11 There's the conspiracy. There's the purchaser.
12 What is purchased is a television or monitor that
13 includes components, perhaps the most important of which
14 is the CRT. There's no -- there's no question that that
15 is a direct purchase.

16 From the very beginning of when this issue was
17 first raised in the Sugar/Linerboard case, in the Sugar
18 case the Third Circuit explained that. And this is at
19 17, that decision. I've also took the chance to just
20 summarize the points I want to make on three pages that I
21 want to leave with you.

22 And the Court in Sugar explained what is
23 self-evident, that we have standing because we directly
24 purchased CRTs from members of a price-fixing conspiracy
25 or from their own on controlled affiliates.

1 And the Court in Sugar explained at 579 F 2d at
2 17, as the defendants here point out, the product which
3 plaintiff purchased is not with sugar but with other
4 candy, more than one ingredient in terms of the product.

5 So you'll remember the sugar case involved
6 putting sugar in candy. And they made the same argument.
7 Defendants made the same argument Mr. Kessler makes here,
8 that a television would have different consideration than
9 candy.

10 To the extent there will be some additional
11 complications underlying the damage claims, however, this
12 must not be allowed to obscure the fact that the
13 plaintiff did purchase directly from the alleged
14 violation.

15 It goes on to say the concern which the Supreme
16 Court in Illinois Brick expressed about the proration of
17 overcharge among a number of entities in the chain would
18 not have been present, nor is that problem of allocation
19 amongst various distributors present in this case.

20 Plaintiff is a direct purchaser and, therefore,
21 entitled to recover the full extent of the overcharge.

22 When Illinois Brick or Delaware Valley is
23 talking about when are we going to permit exceptions to
24 the direct purchaser rule, that's not what we're talking
25 about here. We are direct purchasers.

1 The defense argument is that there's still some
2 complications in showing the price -- effect on the price
3 of a price-fixed component. That is not a complication
4 or pass-through analysis that is discussed in Illinois
5 Brick or UtiliCorp or those lines of cases.

6 Where you have a direct purchaser instead the
7 Supreme Court has said -- that in all of the other
8 decisions that Mr. Lehmann just talked to you about, said
9 there the direct purchaser recovers the full overcharge.
10 If there are complexities in demonstrating that
11 overcharge, such as it was -- that the price fix was on a
12 50 percent component, that is different and does not
13 matter and does not make Illinois Brick applicable.

14 Mr. Lehmann just read to you language from the
15 compressors case. The only Court that questioned Sugar,
16 though it does not reject it, that says no, we're not
17 talking about pass-through analysis when we're talking
18 about this.

19 So when defendants are arguing that complexities
20 in analysis are a reason for denying standing, they are
21 doing it based on this component principle, and they're
22 making that argument even if the CRTs are an important
23 part of the product, 50 percent of the product, 75
24 percent of the product, 90 percent of the product. It
25 would not matter. You would still knock out a federal

1 claim of a direct purchaser.

2 Mr. Lehmann also -- Mr. Kessler, even to make
3 this argument, expressed to you that it would be okay to
4 price fix a cost of manufacturing. That's just an
5 internal price. A horizontal conspiracy to fix the price
6 of a key component of a product creates a federal claim
7 for direct purchases and its also a per se violation of
8 the antitrust laws.

9 That was the instruction to the jury that
10 Mr. Lehmann just read to you from the AUO case.

11 They're not just trying to drive a truck through
12 direct purchaser law. They're also questioning the whole
13 underpinning of antitrust liability for a conspiracy that
14 would jeopardize the other cases that are going on the
15 civil side and would be grounds to question the jury
16 instructions that are being given in these cases.

17 If conspirators agree to fix 50 percent of a
18 product, the direct purchaser has standing to bring a
19 claim. That is not a pass-through analysis through
20 multiple channels of distribution, that that's -- that
21 which is the issue of Illinois Brick. It is entirely
22 different analysis. Does not matter whether it's
23 complex.

24 The Supreme Court in Illinois Brick did not say,
25 well, if there's complex analysis, we're not going to

1 allow an antitrust claim. They spoke about the
2 complexities through multiple channels of distribution
3 and the difficulties, therefore, of allocating damages
4 amongst all those different channels because you would
5 have this group saying, well, we think we got 25 percent
6 of the cost and the other group saying, no, we have 50
7 percent and how are you going to be able to globally do
8 that. How are you going to apportion the claim.

9 That apportionment does not happen here, because
10 we are the direct purchasers entitled to the full
11 overcharge. And that apportionment is the key to the
12 Illinois Brick decision and the complexities that
13 Mr. Kessler raises in his argument.

14 When he read from Illinois Brick, Illinois Brick
15 goes on to say, we understand Hanover Shoe has rested on
16 the judgment that the antitrust laws will be more
17 effectively enforced by concentrating the full recovery
18 for the overcharge in the direct purchasers rather than
19 by allowing every plaintiff potentially affected by the
20 overcharge to sue only for the amount it could show was
21 absorbed by it.

22 That issue does not come up with a direct
23 purchaser of a finished product, a component of which was
24 subject to price fixing. We are the direct purchaser of
25 the full product and of its components.

1 No other plaintiff is going to have standing to
2 bring that federal claim. Apple, HP did not buy directly
3 the CRTs in our finished goods. We bought them. We
4 bought them from conspirators, and we bought them from
5 their controlled affiliates. No one else has that
6 federal claim. That's a mathematical truth. It's a
7 different CRT, which means that it's also a mathematical
8 truth that if you accept this argument that the
9 conspirators are going to reap their ill-gotten gains for
10 every screen that they put into a finished good and sold
11 to a direct purchaser.

12 They tell you, well, there's still going to be
13 complex analysis, but no Court has said that where
14 there's complex analysis you deny recovery to the direct
15 purchaser. Every Court to consider the issues here where
16 there's a direct purchaser of a product with component
17 price fixing has gone in favor of finding that, yes, you
18 are a direct purchaser with antitrust standing. And
19 those are the decisions that Mr. Lehmann just went
20 through with you Sugar/Linerboard, Judge Illston in the
21 LCDs case and Judge Conti in this case on the motion to
22 dismiss.

23 Mr. Kessler tries to distinguish Linerboard by
24 saying no, it's -- and relies on the stipulation here to
25 which we're to say, well, Linerboard alleged the finished

1 products conspiracy, and goes borrowing into the record
2 below the third circuit to try to find that. Mr. Lehmann
3 has explained why that's not correct because of the
4 ellipsis. But you can read the third circuit decision
5 and see that it does rely on a finished goods conspiracy.

6 It is following the Sugar line of analysis and
7 endorsing it and applying it, such as Judge Illston has
8 done and Judge Conti has done.

9 Now, in the cases the defendants are relying on
10 direct purchasers are not being denied standing. Optical
11 disk drive, Mr. Lehmann read to you the language from
12 Judge Seaborg where he confirms that he agrees with Judge
13 Conti and Judge Illston that plaintiffs in this case do
14 not have a standing problem with respect to any ODD
15 devices that they may have purchased directly from
16 defendants. He was dealing with the purchases from
17 non-defendants.

18 Illinois Brick, not at the intermediaries that
19 Mr. Lehmann described.

20 UtiliCorp, the utilities purchased the natural
21 gas, not the natural utility company.

22 Compressors, there the issue, as the Court said,
23 was no named direct purchaser plaintiff has alleged and
24 bought a finished product containing a compressor from a
25 defendant or manufactured a compress and use those

1 compressors to manufacture that finished good.

2 Delaware Valley bundled products purchased from
3 an independent third-party distributor.

4 And Stanislaus was purchases from non-parties to
5 a horizontal conspiracy. The plaintiffs there tried to
6 bring in as a direct purchase claim by going downstream
7 and alleging a vertical conspirator. And the Court said
8 no, that was not good enough to bring that claim.

9 If you accept this standing argument, you're not
10 only going to be making new law; you're going to be
11 reeking havoc in federal antitrust. This is a road map
12 for a cartel. And this was the language from Sugar that
13 Mr. Lehmann read to you.

14 It will allow the price fixer of a basic
15 commodity to escape simply by incorporating the tainted
16 element into another product. It can be 90 percent of
17 the product, 80 percent of the product. There's no
18 limits here. And it's a road map for a cartel to how to
19 make profits. And if you wipe out the direct purchasers,
20 well, we'll have deterrence for indirect purchasers.

21 Mr. Kessler says those are state law claims.
22 Obviously not all state passed those. But you are taking
23 federal law and federal deterrence out of the picture,
24 which is directly contrary to the whole point of the
25 direct purchaser rule of achieving deterrence and going

1 after and creating private attorney generals the direct
2 purchasers to create deterrence against cartels,
3 including international cartels.

4 This would do a severe blow to antitrust laws,
5 which is why you're not seeing the Courts embrace it or
6 endorse this principle.

7 It would be a ground-breaking ruling that would
8 undermine this case that would create the conflict that
9 you've expressed between this case and the LCDs case
10 creating delays in the schedule of that case where our
11 plaintiffs are also parties and creating the slow-down in
12 cases that happen when you have intra-district conflicts
13 going up to the Ninth Circuit, which would be the next
14 step of the defendants.

15 It would be used to challenge the AUO verdict
16 and the instructions there.

17 This is a severe thing that's being asked that
18 doesn't have any authority behind it. And we think you
19 should reject it and allow these cases to go forward.

20 HON. CHARLES LEGGE: Bear in mind with respect
21 to your case, my recommendation that Judge Conti,
22 whichever it will be, will contain to operative language
23 doing anything to your case for you or against you
24 whichever way it is. Now, I understand that you're
25 concerned about what might be done in this case, its

1 impact on your case. I understand that. And that's why
2 I'm listening to you. And accepting the caution of being
3 careful what I do recommend with this should have some
4 resident impact on the case. I accept that. Whether
5 you're right or wrong, I'm not discussing the merits.

6 MR. ISAACSON: Right.

7 HON. CHARLES LEGGE: But I am not going to enter
8 any recommendation that Judge Conti make any ruling on
9 your cases as all. Okay.

10 MR. ISAACSON: Understood, your Honor. We take
11 the presidential effect --

12 HON. CHARLES LEGGE: No, I understand that, and
13 I appreciate your concern, and I appreciate --

14 MR. SAVERI: May it please the Court, your
15 Honor, Rick Saveri. I'm going to be very brief. I'm
16 just going to speak regarding the Rule 56(d) declaration
17 that we submitted in support of the summary judgment.

18 I'll also try to speak up so the court reporter
19 can hear me and the people at the other end of the hall
20 and on the phone hear me.

21 Importantly, your Honor, the Rule 56(d)
22 declaration sets forth the factual issues in dispute
23 between the parties, the status of discovery of the
24 action as it relates to the issues at hand, and the
25 further discovery needed to be resolved pending before

1 your Honor. Importantly many of the cases cited to your
2 Honor, and particularly the LCD opinion denying summary
3 judgment for Toshiba, the same Toshiba in this case, the
4 identical Toshiba companies in this case, and the issue
5 before your Honor was decided after a full discovery and
6 a complete record. It was not decided --

7 HON. CHARLES LEGGE: I'm sorry, which case is
8 that?

9 MR. SAVERI: Let me give that to your Honor.
10 That was the summary judgment decision that was
11 decided --

12 HON. CHARLES LEGGE: In LCD?

13 MR. SAVERI: In LCD. And I'll give you that
14 cite.

15 It was November 7, 2011, 2011 West Law 5357906.

16 And that was like your Honor has done here,
17 there was a full schedule that was set up where there was
18 then the discovery motions, expert reports, and then a
19 full hearing after the whole discovery was done, and a
20 complete record was made before your Honor.

21 Currently, as your Honor knows, discovery we
22 have just begun. The defendants have just turned over
23 roughly five million pages of documents, many of which
24 are in foreign language. We are going through those and
25 have yet to complete the review of those documents.

1 Just yesterday your Honor has ruled on the
2 schedule in this matter setting forth the completion of
3 fact discovery and the hearing and the discovery
4 protocols for depositions. That has yet to be turned
5 into an order by Judge Conti. So that's still pending to
6 be an order.

7 Importantly, that relates to the pending summary
8 judgment motion here your Honor. Plaintiffs served
9 30b(6) declarations on the defendants related to the
10 issues needed to be decided. All of the defendants --

11 HON. CHARLES LEGGE: But the rule on this for or
12 against, do I need any of that? Isn't it enough, isn't
13 it enough that they've got in the record that these nine
14 companies, I guess they are, never purchased CRT? Isn't
15 that enough to rule for or against them on what
16 Mr. Kessler --

17 Do I need any of this discovery?

18 MR. SAVERI: We feel that you do, your Honor,
19 because a few of the facts that they put before you, for
20 example, that we asked in these 30b(6)s were -- are the
21 markets for CRTs and the televisions and the monitors --

22 HON. CHARLES LEGGE: If there is a bright light
23 rule.

24 MR. ISAACSON: Right.

25 HON. CHARLES LEGGE: That purchaser of finished

1 product does not have standing to sue for the price-fixed
2 product that is incorporated into it. If that's a rule
3 of law, I don't need to analyze markets. I don't need to
4 analyze complexity, although I think it's self-evident.
5 But I don't have to do that.

6 MR. SAVERI: Well, your Honor, as far as exactly
7 that, are they separate markets, there's no expert report
8 on that.

9 HON. CHARLES LEGGE: I don't care.

10 MR. SAVERI: In fact, your Honor, there's not
11 even a declaration that they sold product to the Dell,
12 the Visio, or Sharp, or anybody they say is protectors --

13 HON. CHARLES LEGGE: I don't need that to rule
14 on the motion, do I?

15 MR. SAVERI: Well, your Honor, we feel some of
16 those issues are intertwined into the decisions.

17 HON. CHARLES LEGGE: They are in the rationale.
18 I'll recognize they are in the rationale of some of the
19 decisions. But I don't think I need that to rule on
20 their motion.

21 MR. SAVERI: Fair enough, your Honor. We set
22 that forth in our declaration. And so, like I said
23 before, your Honor, the declaration set forth what we
24 believe are those factual issues, and we presented those
25 issues. We asked for 30b(6) of the defendants. They've

1 all been objected to. So that issue is in the
2 declaration before your Honor.

3 Thank you, your Honor.

4 HON. CHARLES LEGGE: Thank you. All right,
5 Mr. Kessler, do you want to take a few minutes break
6 here?

7 MR. KESSLER: I will do whatever the Court would
8 prefer. I could plow in or if the Court would --

9 HON. CHARLES LEGGE: Let's take ten minutes and
10 maybe get it organized.

11 (Break taken.)

12 HON. CHARLES LEGGE: All right, back on the
13 record.

14 Defendants rebuttal argument please,
15 Mr. Kessler.

16 MR. KESSLER: Thank you, your Honor.

17 I want to start out that contrary to what was
18 argued to your Honor, this Court would be the first to
19 rule that there is no Illinois Brick standing for someone
20 who did not purchase a price-fixed product and that it
21 would not punch a major hole in antitrust jurisprudence
22 and the world would not come to an end.

23 First of all, I am reading now from the
24 Stanislaus case, September 3, 2010, decided in the
25 Eastern District of California, I believe the world is

1 still standing. Plaintiff alleges the defendants
2 conspired to fix the price of the raw materials for tin
3 cans, not the product plaintiff purchases.

4 This, by the way, is on page -- this is on page
5 8 of the decision.

6 The Court then quotes Shamrock, the Ninth
7 Circuit case in Shamrock.

8 Illinois Brick is inapplicable to claims against
9 remote sellers when the plaintiffs allege that the
10 sellers conspired with intermediaries in the distribution
11 change to fix the price at which the plaintiffs
12 purchased, at which the plaintiffs purchased.

13 The Court then goes to say thus the products
14 purchased by plaintiffs must be the subject of the
15 price-fixing conspiracy.

16 Think how significant that ruling is for this
17 case where we have a stipulation that the product
18 purchased by these nine plaintiffs is not the subject of
19 the price-fixing conspiracy.

20 And then it goes on to say, compare Shamrock
21 Foods, plaintiff alleged the conspiracy was to fix the
22 prices of the dairy products at the retail level.

23 By analogy the Court concludes if Stanislaus is
24 the consumer, then plaintiff must allege there was a
25 conspiracy to fix the price at the retail level, the

1 price at the tin cans.

2 No Illinois Brick standing. The world did not
3 fall off its axis. That's what the Eastern District of
4 California has stated. You would be joining the Eastern
5 District of California in that ruling.

6 Next decision, the refrigerator compressors
7 decision. And I'm now quoting -- this is on page -- what
8 page is this? 658 of that decision, as follows --

9 HON. CHARLES LEGGE: I'm sorry, I forgot what
10 Court that is.

11 MR. KESSLER: This is by the judge in the
12 Eastern District of Michigan. Okay. And this was
13 decided June 13, 2011.

14 And you remember, your Honor, this was a case
15 where the plaintiffs only claim they purchased
16 refrigerators, not the price-fix component which were
17 compressors that go inside a refrigerator.

18 And they're discussing Linerboard. And this is
19 what the Court said.

20 This case can be distinguished In re Linerboard
21 in two important respects. First, although the Court did
22 not focus on this, the plaintiffs in In re Linerboard
23 alleged a conspiracy to fix both Linerboard, a component,
24 and corrugated sheets, a finished product.

25 I'm noting that because it was stated by counsel

1 that we misrepresented Linerboard. I would submit we did
2 not misrepresent Linerboard.

3 Further what the quote that plaintiffs' counsel
4 read from Linerboard spoke about was a conspiracy to
5 increase the price of the Linerboard for the purposes
6 with the motive to increase the price of the finished
7 product.

8 They are precluded from making that claim here.
9 That's the conspiracy agreement that they argue to your
10 Honor on the Rule 11 motion, which ultimately your Honor
11 said that was no basis for, and then they stipulated they
12 wouldn't allege it.

13 So they cannot allege here with this stipulation
14 and ruling the conspiracy alleged in Linerboard.

15 And reading back in compressors, here the DP
16 plaintiffs allege only a conspiracy to fix the price of
17 compressors, which they claim had the ultimate effect of
18 increasing prices for compressor products.

19 That is, the DP plaintiffs do not allege that
20 defendants conspired to fix the price of finished
21 products that contain compressors.

22 That, of course, as this case, has to be by
23 stipulation. What does the judge go on to say. That is
24 a fundamental difference because the plaintiffs in In re
25 Linerboard allege that the defendants had conspired to

1 increase the price of corrugated sheets and that the
2 plaintiffs were direct purchasers of the corrugated
3 sheets.

4 So, again, the Court concludes that only the
5 purchasers of the compressors can have standing.

6 That, your Honor, again, you would be joining
7 this second court to rule this way with respect to that.
8 So, again, this would not be unprecedented. This would
9 not be causing the world to change.

10 It was mentioned this would somehow affect the
11 government's case under LCD in the jury trial. The
12 government does not sue under Section 4 of the Clayton
13 Act. The government does not have to prove its right to
14 damages. Whatever your Honor rules has no impact on the
15 United States of America or any government case.

16 HON. CHARLES LEGGE: I understand.

17 MR. KESSLER: And this is what I want to get to.
18 You know if this case is all about Section 4. If you
19 read -- if you read Illinois Brick, what they end up
20 saying and what they say again in UtiliCorp, is that
21 we're not changing our ruling under Section 4 of the
22 Clayton Act.

23 In fact, going back in UtiliCorp, okay, to that
24 page we quoted before which was right before Roman four,
25 it says having stated the rule in Hanover Shoe and adhere

1 to it in Illinois Brick, we stand by our interpretation
2 of Section 4. That's what this is about.

3 Now, why is that significant? Well, we heard a
4 lot of word games from plaintiffs' counsel. One thing
5 was said was, well, these are direct purchases. So of
6 course they have standing.

7 No, that's putting the rabbit in the hat.

8 The Illinois Brick question is are they direct
9 purchases of the price-fixed product. There's no
10 disputes. They did not purchase the price-fixed product.
11 They purchased a television or they purchased a computer
12 monitor, which means the only way to show Section 4
13 injury, it is impossible to show it without proving to
14 what degree did the price of the television or the
15 monitor reflect any conspiratorial -- alleged
16 conspiratorial increase in the price of the CRT.

17 There's no dispute here, for example, that there
18 are these separate entities affiliated companies they
19 have. This is in their complaint. Your Honor know
20 there's LPD which was a joint venture which they claim
21 was affiliated with Phillips and with LG. There's MTPD
22 who was affiliated with Panasonic and Toshiba. There are
23 other affiliated entities, you know, involved here.

24 And the point is the direct purchasers here on
25 the Illinois Brick are either the unrelated direct

1 purchasers like HP, Dell, Sony, Visio, et cetera, or
2 they're the affiliated companies.

3 So what if -- which they claim, well, you should
4 ignore that and go through it.

5 The point here is under no circumstances are
6 these particular plaintiffs direct purchases of the
7 price-fixed product.

8 So what they want your Honor to do is to create
9 a new exception for that group, saying it will help
10 antitrust deterrence.

11 We would respectfully suggest the Supreme Court
12 and the Ninth Circuit has said the Courts are not in that
13 business of going through one by one and deciding is this
14 good for deterrence or bad for deterrence, is it good for
15 -- is it easy to prove pass-on or not easy to prove
16 pass-on. That's what's been taken away.

17 We heard arguments, well, what if it's 50
18 percent of the product? What if it's a big product?
19 What if it's 80 percent affiliated?

20 Those are all issues of how easy or difficult it
21 is to prove pass-on. That's all. It's always pass-on.

22 I heard it said, well, you don't have to prove
23 pass-on if it's the same company. Of course you have to
24 prove pass-on. If it's a different product, which they
25 can't dispute, so a television, let's say, costs X.

1 Okay. A \$700 television. And a CRT costs, pick your
2 price, they want to use 50 percent, say it's a \$350 CRT.
3 And let's say the allegation is the price was increased
4 ten percent, \$35.

5 Okay. This doesn't matter because it doesn't
6 matter what the numbers are. The point is to satisfy
7 Section 4 they'd have to say how much of any of that \$35
8 made its way into the price of the television, and what
9 the Supreme Court said is we can't do that, as opposed to
10 the economist theoretical models in the real world trying
11 to litigate case by case how much of that was -- affected
12 the price. Whether it went there is not in the federal
13 antitrust law is what we want to do.

14 Now in indirect cases some states, whatever the
15 states are have said we do want to do that. That's okay.
16 That's the policy of those states. But in the federal
17 context it's been directed.

18 I want to come back to Judge Conti's opinion
19 because they spent a lot of time arguing Judge Conti
20 decided that.

21 In all due respect, I think this is completely
22 wrong. Here is what Judge Conti said about this issue in
23 the context.

24 First of all, his discussion to start under F
25 antitrust standing, and he says -- he starts out solely

1 with the discussion of AGC standing, nothing about
2 Illinois Brick at all. If you look at the context that's
3 leading this, he says the special master recognizes --
4 recommends denial of the motion to dismiss based on
5 supposed lack of standing, and then he sites the AGC
6 factors. No mention of Illinois Brick in that paragraph.

7 Then after discussing AGC he says the following.
8 The first sentence is critical.

9 Here the direct purchase plaintiffs allege they
10 purchased CRTs or CRT products from defendants or their
11 subsidiaries at inflated prices due to defendants'
12 unlawful conduct citing the direct complaint.

13 Well, if you look at those paragraphs of the
14 direct complaint, you'll find this is where the
15 conspiracies alleged regarding not just CRTs but also CRT
16 products. And that's what he's dealing with here. We
17 also know that because in your Honor's recommendation
18 decision, which is what he's basing this on, and this is
19 page 18 of the printed version of your Honor's decision,
20 says the following.

21 He says -- he says defenders move to dismiss
22 based upon an argument of plaintiffs supposed lack of
23 standing. However that argument is based in turn upon
24 defendant's perception that the complaints allege a
25 price-fixing conspiracy only as the CRTs. And the

1 special master interprets the complaints as alleging a
2 conspiracy as to CRT products as well.

3 That's what was presented to judge -- to Judge
4 Conti. And it's in that context when he says this is the
5 type of injury the antitrust laws were attended to
6 address, and, yes, he does cite Linerboard, but without
7 any discussion at all about any of the issues we're
8 discussing now.

9 He then goes on for the first time to mention
10 Illinois Brick in the next paragraph, and only does that
11 for the indirects saying Illinois Brick's been repealed.
12 There's absolutely no discussion of the relationship
13 between Illinois Brick and Linerboard or anything else.

14 So for them to say this is a ruling by Judge
15 Conti in light of your Honor's recommendation, in light
16 of the fact that the conspiracy involved both in this
17 language, I would suggest, your Honor, is simply not
18 correct. I would also note that --

19 Well, that's my point about Judge Conti's
20 decision.

21 The next thing I want to mention is they spoke
22 about ODDs. What happened in ODDs is Judge Seaborg was
23 dealing with a conspiracy to fix the price of both ODDs
24 and ODD devices. He says that repeatedly. ODD devices
25 are the equivalent of CRT products.

1 Okay. It is true he was particularly skeptical
2 of the conspiracy that involved third parties like HP and
3 Dell, and he granted a Cromley (phonetic) motion based on
4 that. But he independently said they're alleging a
5 conspiracy regarding both the products and the finished
6 products which is the only reason why he suggested they
7 might have standing for the ODD devices if they purchased
8 it because there was a conspiracy alleged with respect to
9 that.

10 It's very much like your Honor's original
11 recommendation decision.

12 And when he goes on to say is that, but I don't
13 see in any event how there could be a conspiracy
14 involving HP and Dell and others who were victims.
15 Totally separate issue in the case.

16 On the issue that's on point he says nothing
17 inconsistent with the motion we're making. In fact, he's
18 very consistent with the motion he's making because he
19 ends up saying you must allege a conspiracy that you
20 bought the ODDs. That's his bottom line with regard to
21 that.

22 And, again, as I said, they pled their case, and
23 that's now before him. But there's no way that decision
24 is inconsistent on that point.

25 Next point here is Hanover Shoe, Illinois Brick,

1 Delaware Valley, UtiliCorp. I have no doubt that if your
2 honor looks at those decisions, you will come to the
3 conclusion that contrary to what's been argued, that the
4 complexity of proving Section 4 pass-on is -- was the
5 primary consideration that motivated each of those
6 decisions. In fact, it is specifically noted in
7 UtiliCorp that that argument, not deterrence, was the
8 first concern of Hanover Shoe and Illinois Brick. Your
9 Honor will see that. That was the major concern in those
10 cases.

11 Plaintiffs conceded, conceded that the line of
12 cases here which involve --

13 Lost my train of thought for a second.

14 The line of cases here based on the controlled
15 subsidiary exception involved the same product, not, you
16 know, not a transformed product, not a different product.
17 It does not matter, as your Honor said, how much it's
18 transformed. It does not matter, as your Honor said, how
19 different the markets are. It's the mere fact that it's
20 a different product, in a different market. Whatever it
21 may be, is that alone enough where they didn't purchase
22 the price-fixed product as a matter of law to say there
23 isn't standing. There's no factual issue regarding any
24 of that here.

25 This will not have any impact on LCD. LCD

1 obviously has its own rulings. Okay. They will
2 presumably be appealed and not appealed to the Ninth
3 Circuit. They're either wrong or right. What your Honor
4 does I don't think is going to have any impact on Judge
5 Illston anymore, frankly, your Honor, than I hope Judge
6 Illston's decision has any impact on your Honor.

7 I think you're both going to independently
8 decide what you believe is correct, and then ultimately
9 the Ninth Circuit may be the one who either decides it in
10 LCD or here.

11 What I am very comfortable about is that the
12 governing Ninth Circuit will in Delaware Valley in the
13 Supreme Court indicate that where these issues must be
14 proven, and there's no way again for plaintiffs to avoid
15 this by saying, well, they're direct purchasers. They're
16 not direct purchasers of the price-fixed product.
17 There's no way for them to say they don't have to prove
18 pass-on because the argument they make as well is not
19 vertically different.

20 Frankly, your Honor, it is more difficult to go
21 from one market to another where other companies are not
22 conspiring in terms of the complexity of proof than it is
23 to go down the distribution chain. That's why we cited
24 the umbrella price-fixing cases. In other words, the
25 complexities are each more profound of trying to figure

1 out what was passed on in the television or refrigerator
2 or in ODD device or in a tin can, that's what those cases
3 stand for, than it would be just by going up and down on
4 a distribution chain issue.

5 So the fact that it's not vertical, that their
6 problems are horizontal complexity, because it's a
7 different product in a different market, makes this worse
8 from a Clayton Act Section 4 standing standpoint.

9 Finally, your Honor, I want to come back to the
10 questions that your Honor asked at the very beginning.

11 First, we're looking for a narrow ruling on a
12 narrow issue based on this stipulation which does not
13 allow them to allege a conspiracy with a motive to fix
14 the prices of the finished products and which there's no
15 dispute we heard from counsel that these nine plaintiffs
16 did not purchase CRTs, that there's no dispute they are
17 different products in different markets, whatever those
18 differences may be, and there's no dispute as,
19 plaintiffs' counsel argue, they don't deny this, that the
20 impact could vary. In that narrow set of cases and
21 circumstances, we believe Section 4 of the Clayton Act
22 would require them to prove things which Illinois Brick,
23 Delaware Valley, UtiliCorp all say is not for the federal
24 courts. And whatever deterrence needs to be done here
25 will be provided by the HP, Dells, Sonys of the world, by

1 the United States government, which was not affected by
2 this, by the indirect case that may to decide to include
3 the purchases in indirect.

4 In fact, the fact that of the indirects decided
5 not to include these purchases in their definition of
6 indirect is pure happenstance. If your honor were to
7 rule that we -- that they can be included in direct case,
8 that would not preclude another plaintiffs' counsel from
9 coming in and saying they're indirect too.

10 In other words, the mere fact that there seems
11 to be an understanding between counsel on this side does
12 not eliminate this problem. It seems to me either
13 they're direct or they're indirect under federal law.
14 You know, it's not that you could avoid the issue simply
15 because the indirect plaintiffs' counsel here have now
16 tried to pick a fight, if you will, with the direct
17 plaintiffs as to what's there. That wouldn't protect us
18 from another suit from somebody else saying I've got
19 these indirect plaintiffs.

20 So the question is someone has to decide.
21 They're in one box or the other. We would respectfully
22 submit, because they must prove impact on another product
23 in another market, they are at best indirect.

24 Unless your Honor has any other questions, I
25 think I've covered what I need to do.

1 HON. CHARLES LEGGE: Well, I'd like to return
2 back to this stipulated order.

3 MR. KESSLER: Yes.

4 HON. CHARLES LEGGE: Tell me what you think the
5 significance of the provisions' portion of that paragraph
6 three is.

7 MR. KESSLER: Okay. Let me just get that out in
8 front of me.

9 Paragraph three. Okay. I believe that what
10 this means is that this was an acknowledgement that by
11 dropping the claim of a conspiracy, which is what this
12 does, they withdraw their -- their claim of a conspiracy
13 encompassing finished products. That's what they
14 dropped. So they can't --

15 So, first of all, they can't allege, as they
16 said was alleged in Linerboard, that there's a conspiracy
17 to fix CRTs for the purpose of increasing the price of
18 television or monitors. They're precluded from that.
19 This then said provided that this was not resolving the
20 issue, that the issue or possible impact remained in the
21 case. And in our view it remains in the case in the
22 following way.

23 If we are right, the Supreme Court says it's in
24 the case but they are not direct purchasers, at least
25 with respect to Section 4.

1 By the way, they could possibly allege a Section
2 16 injunctive relief claim, which as your Honor knows is
3 not bound the same way. That's not an Illinois Brick
4 issue. So it may remain in the case with respect to
5 Section 16 anyway with respect to that.

6 But with respect to Section 4 of the Clayton
7 Act, if we're right, they're precluded from trying to
8 move that. If we're wrong, it remains in the case
9 because they now have to go forward and try to prove that
10 impact plaintiff by plaintiff. Or if it's a class, on a
11 class-wide basis with respect to that, which makes them,
12 by the way, look exactly like who? It makes them look
13 exactly like the indirect plaintiffs. So that even --

14 what they're saying they're entitled to try to
15 prove it under the step. If we're wrong in Illinois
16 Brick, it puts them right in the indirect category
17 because they'd have to prove the impact or effect on the
18 prices of finished products.

19 Now, we believe on the pure legal issue, under
20 Section 4 they can't allege Section 4 standing with
21 respect to that. If they are right, it would continue,
22 but it'd make them exactly the same as the indirects,
23 which is why I said they've got to in one bucket or the
24 other.

25 So basically, your Honor, I believe what this

1 stip does is it leaves this issue now for your Honor to
2 resolve whether as a matter of law they can seek to prove
3 this impact or whether Illinois Brick precludes it or
4 whether they --

5 HON. CHARLES LEGGE: You don't think that
6 language entitles them to go through discovery, go to
7 summary judgment, go to trial on the impact issue?

8 MR. KESSLER: Absolutely not, your Honor.
9 Because we did not change by this stipulation either what
10 the Illinois Brick rule is or is not. And, in fact, even
11 if we're wrong about Illinois Brick, they would still
12 have to, under Section 4, raise a genuine issue of
13 material fact on the impact or they couldn't go to file
14 on summary judgment.

15 In other words, there's two steps to this
16 analysis which clearly the stipulation did not change.

17 One is can they -- as a matter of law can they
18 prove Section 4 injury not being direct purchasers, which
19 this step didn't address at all. And, No. 2, if they
20 can, as a matter of law, pursue it, they'd still have to
21 raise a general issue of material fact to go to trial
22 even on the impact issue. And we got there.

23 So this step doesn't change either of those
24 points.

25 MR. SIMON: Your Honor, I wasn't going to speak

1 today, but what Mr. Kessler is saying right now is
2 totally revisionist history.

3 I stood I think this in very spot, and I was
4 arguing at one of the hearings, and Mr. Kessler pointed
5 to me and said, Mr. Simon, do you stipulate that fact
6 that impact can remain in this case.

7 And he said it in the middle of my argument.

8 He also said at the May 26, 2011, hearing
9 exactly what Lehmann said to you. "In LCD they argued
10 impact, okay, and they argue that under the Sugar
11 Linerboard cases. They have standing to sue for that.
12 Okay. If they were doing that here, I wouldn't have this
13 motion. Okay. So they should be doing, asserting what
14 they asserting in LCD."

15 That's exactly what the stipulation was
16 negotiated and intended to be. And Mr. Kessler is now
17 running away from it, and he's running away from it
18 because he wants it to suit his argument here today.

19 If you accept his argument, it takes entirely
20 the entire history of this case out of that stipulation.
21 He's reading it out just like he wants to read out
22 Hanover Shoe and Royal Printing and everything else.
23 It's actually revisionist history.

24 MR. KESSLER: Your Honor, if I may respond since
25 Mr. Simon came into my argument.

1 First of all, what he is quoting when I said we
2 wouldn't be here making this motion here today was we
3 wouldn't be making the Rule 11 motion. What that
4 argument was about had nothing to do with the subsequent
5 negotiation of this stip, in all due respect to Mr.
6 Simon.

7 During the Rule 11 motion, okay, which your
8 Honor recalls was quite contentious, what we said is had
9 they been making the argument in LCD under Sugar and
10 Linerboard, we would not have brought a Rule 11 motion.
11 And that is a hundred percent correct.

12 The Rule 11 motion was solely based on the lack
13 of any objective basis for alleging a conspiracy on the
14 finished products. That's what was discussed in that
15 hearing. That's what was discussed about will you
16 stipulate to that. It had nothing to do with this.

17 After that hearing, your Honor ruled and
18 granted, made a recommendation on Rule 11.

19 Subsequent to that, we negotiated a stip to
20 vacate the Rule 11 sections and to do this stip. And
21 this stip, I am happy has an officer of the court, had
22 nothing to do with Illinois Brick one way or the other.
23 It neither required them to agree with our argument or
24 required us to not agree or required us to agree with
25 their argument.

1 It had nothing to do with Illinois Brick, which
2 we now are arguing to the Court.

3 In fact, your Honor will remember, and this I'm
4 quite sure, okay, in the argument for Rule 11, we said
5 what are the reasons to consider that motion now was
6 because it could lead to issues like who's in the class,
7 who's not in class, who is direct, who's not indirect.
8 In fact, your Honor noted that in your Honor's opinion on
9 the Rule 11 that this could have significance with
10 respect to other issues in the case.

11 Well, now it has significance with respect to
12 other issues in the case because it's clear if they were
13 alleging a conspiracy of finished products, then we
14 couldn't make this Illinois Brick argument because then
15 we would have been -- they would be direct purchasers of
16 the product that was there.

17 So, again, with all due respect to Mr. Simon,
18 he's conflating what was going on during the Rule 11 in
19 this stip, and I'm not arguing this stip precludes them
20 from taking this position. Quite the contrary, I want to
21 be clear. The stip has nothing to do with this argument
22 one way or the other except to the extent it precludes
23 them making the conspiracy claim. It has great
24 significance on that point of the argument, but it
25 doesn't preclude them from --

1 HON. CHARLES LEGGE: Whether the stipulation
2 precluded you from making any contention other than they
3 can go ahead all the way with their case --

4 MR. KESSLER: And I would say, your Honor, that
5 was the intention of this. It would have said something
6 like parties hereby will not make any argument that Sugar
7 and Linerboard is not the law and would that said it
8 won't make any Illinois Brick argument that there's no
9 way to read that into that particular language.

10 HON. CHARLES LEGGE: What you're really saying
11 is the thing was flowing along.

12 MR. KESSLER: Yes.

13 HON. CHARLES LEGGE: You took one rock out of
14 the river bed, which was the issue of is there -- are we
15 concerned with the conspiracy of the finished product and
16 just simply leave the rest to flow along as it will.

17 MR. KESSLER: That's correct. And they wanted
18 -- the reason for that language, to make it clear, is
19 that they were not precluded from arguing this. But it
20 wasn't to make it clear that we were precluded from that,
21 that we were waiving Illinois Brick. That would make no
22 sense in the language of this stip.

23 I don't think anyone waived anything other than
24 the conspiracy point.

25 MR. GUIDO SAVERI: Your Honor, I've been quiet.

1 HON. CHARLES LEGGE: I was wondering, Mr.
2 Saveri. It's been two hours 25 minutes and you haven't
3 said a word.

4 MR. GUIDO SAVERI: Your Honor, the record speaks
5 for itself. I think the position that Mr. Lehmann made,
6 this is a -- it's a simple issue. There's no doubt that
7 what Mr. Kessler is saying is incorrect. He doesn't have
8 standing.

9 The position that we took that we do have the
10 right to go forward in spite of the fact that our nine
11 day plaintiffs only bought the finished product.

12 I think the feel that I feel maybe surprised
13 that I think that Mr. Kessler, with all due respect to
14 Mr. Kessler, and although we fight back and forth, we're
15 relatively good friend. I just --

16 HON. CHARLES LEGGE: Comes now the but.

17 MR. GUIDO SAVERI: He's making all that money
18 that he's making on representing the National Football
19 League, and I told him this morning that my office when I
20 was with Joe Alliotto was responsible under the Radovich
21 case, to have football under the antitrust laws rather
22 than the rules that applies to baseball.

23 HON. CHARLES LEGGE: Will you take him out to
24 continue dinner please?

25 MR. KESSLER: You know what, I told him I

1 thanked him for that and maybe dinner is a good idea.

2 MR. GUIDO SAVERI: But the point is he's
3 reneging, he's reneging on the stipulation that we made
4 in connection with the Rule 11 motion.

5 The stipulation, as Mr. Simon said, was exactly
6 the reason we entered into that stipulation. We could
7 have denied that, taken an appeal on the ruling and
8 everything else. The purpose of that stipulation was as
9 is specifically written into it, that the issue of the
10 finished product and the effect that the price fix on the
11 -- on the tube, the price fix on the tube had an effect
12 on the finished product, and that based on that
13 stipulation, the agreement was that we would be permitted
14 to show that the price fix on the tube had an effect just
15 like LCD on a finished product.

16 That is why we entered into the stipulation, and
17 it surprises me to hear of the position of
18 Mr. Kessler. He's taken that position because he is
19 stuck with the stipulation that he suggested, and
20 specifically when he threw it at Mr. Simon time and time
21 and again and at me, why don't you do what was done in
22 LCD. Why don't you do what you're doing in LCD. Why
23 don't you do what you're doing in LCD. We did. And he
24 ought to live by it. And the stipulation that we entered
25 into is exactly what the law is and what it permits us to

1 do.

2 He is knocking the antitrust law back a million
3 years. That he has to argue that because he put himself
4 in a position that now he wants to renig from.

5 The position that we took in this case is
6 absolutely right. If you listen to his arguments, you'll
7 knock out all the law.

8 MR. SIMMONS: Mr. Kessler's clients aren't the
9 only one that signed the stipulation.

10 HON. CHARLES LEGGE: No, I understand.

11 MR. SIMMONS: I think Mr. Kessler put it very
12 succinctly.

13 Nothing in that stipulation precludes the Court
14 from considering the motion that has been brought before
15 it. What it does require is that if that motion is
16 denied, if we lose, that the plaintiffs have to put to
17 their burden of maintaining their status of direct
18 purchasers by showing that there was an impact on the
19 alleged price-fixed -- from the alleged price-fixed
20 product, the tubes, into the product that they didn't
21 purchase and for which there is no price-fixing
22 conspiracy, the finished products. That's what the
23 stipulation says.

24 They're not relieved of that burden if they're
25 permitted to go forward, but there's no -- we've had no

1 understanding to the contrary. The notion that anyone is
2 reneging on the stipulation is simply, with all due
3 respect, that is revisionist --

4 MR. KESSLER: Your Honor, I have great fondness
5 and respect for Mr. Saveri, and everyone on the
6 plaintiffs' side. I have a 25-page brief filed in
7 opposition to our motion. Nowhere in the 25 -- this is
8 their brief. And nowhere in the 25 pages did they make
9 what they now believe is this preclusive argument that
10 the stipulation precludes this motion.

11 One would think --

12 HON. CHARLES LEGGE: Maybe I invited it by
13 asking the question.

14 MR. KESSLER: One would think if that was the
15 clear understanding the way they make it, that somewhere
16 in these 25 pages they could have squeezed that argument
17 in. I would suggest, your Honor, that wasn't the
18 understanding. What we did was we left this issue for
19 the Courts to decide, which is where we are.

20 MR. GUIDO SAVERI: I just want to say, one
21 minute, aside from the stipulation which I think he
22 should live by, the position we made today we are right
23 on the law. Aside from the stipulation, even if there
24 were no stipulation, which he should live by, we are
25 right on the position that we made that we have stated

1 what the law is and what the Court should follow.

2 MR. SIMON: The stipulation all allows us to do
3 discovery on the very issue he's saying shouldn't be in
4 the case for which it's purely a legal issue and not a
5 factual issue.

6 We would never have end into agreement to do
7 discovery on that issue unless as we say as opposed to
8 what Mr. Kessler says.

9 MR. GUIDO SAVERI: And, technically speaking, in
10 relation to the comment just made down there, should
11 there be a ruling that a finished product is not involved
12 in the case, Toshiba is still in the case, in the LCD
13 case. And if there's a ruling in this case to the
14 contrary, there's nothing to prevent Toshiba to going to
15 Judge Illston and saying there's a contrary decision in
16 CRT right on the button. Because Toshiba is still in
17 both cases.

18 And so there be would a ruling, which it would
19 be wrong, respectfully, your Honor. They would cite that
20 decision, and they would go in Monday because it's the
21 LCD case is set to be tried on April 23. So they'll go
22 in with a ruling and say that judge issued a ruling
23 exactly contrary to yours.

24 I respectfully submit that our position is
25 correct, but that's what could happen and would happen.

1 HON. CHARLES LEGGE: All right. The motion will
2 stand submitted.

3 MR. ALLIOTO: Your Honor, I beg your pardon.
4 This is Mario Alliotto on behalf of the indirect
5 purchasers. May I be heard? I know you've heard a lot
6 of argument, and I want to make a few points.

7 There was some suggestion today that there is
8 just a labeling problem or a realignment problem, that if
9 the direct purchasers' claims are knocked out, that they
10 would simply be thrown into the indirect purchaser
11 bucket. I think that was the phrase that was used, "the
12 indirect purchaser bucket."

13 HON. CHARLES LEGGE: And you're the bucket
14 bearer?

15 MR. ALLIOTO: Yes.

16 There is an indirect purchaser bucket, and it's
17 a bucket that alleges a class on behalf of end users of
18 CRT products. End users. That has nothing to do with
19 the class that is being alleged by these, we'll call them
20 for the time being, direct purchasers.

21 HON. CHARLES LEGGE: Are you picking up that,
22 are you picking that language up out of your consolidated
23 complaint?

24 MR. ALLIOTO: Yes, your Honor.

25 HON. CHARLES LEGGE: I don't have it in front of

1 me, and I've forgotten the language.

2 MR. ALLIOTO: We will see to it that you've got
3 it.

4 HON. CHARLES LEGGE: I've got it. It's in my
5 cubicle. I've got it. But I wanted to make sure where
6 you were getting that language. That's from your own
7 complaint?

8 MR. ALLIOTO: From the most recent operative
9 complaint. It would have been end user complaint.

10 And that is very important because this group,
11 this direct group has completely different claim.
12 They're not subsumed within our class. They would have
13 to -- I don't know what would happen, but they would, I
14 assume, would have to realign claims under the state law.
15 And let me just say what the effect of that would be. It
16 would drastically reduce their case because, as your
17 Honor knows, under the state law not every thing has an
18 indirect purchaser statute.

19 HON. CHARLES LEGGE: I'm aware of the economic
20 impact on the case.

21 MR. ALLIOTO: Okay. Well, that is, I would go
22 so far as to say I don't even know if there would be a
23 case. But I'll leave that to other --

24 HON. CHARLES LEGGE: What you're telling me -- I
25 think what you're telling me is that were I to agree with

1 the defendants, it wouldn't be automatically that they'd
2 suddenly fall into your group and proceed ahead with your
3 case because you are now proceeding with it.

4 MR. ALLIOTO: Yes, it would be automatic that
5 they would not fall into my group.

6 HON. CHARLES LEGGE: Okay. Okay. I understand
7 what you're saying.

8 MR. ALLIOTO: That is the point, your Honor.

9 HON. CHARLES LEGGE: I understand.

10 MR. ALLIOTO: That is the only point.

11 I appreciate you hearing me out. Thank you.

12 HON. CHARLES LEGGE: By the way, I got your
13 letter yesterday about the matter of the translations,
14 and I'll go back and take another look at that. Okay.

15 MR. ALLIOTO: Thank you, your Honor.

16 HON. CHARLES LEGGE: We'll recess then. I'm
17 signing off on the telephone.

18 (Hearing concluded at 12:54 p.m.)
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) ss.
COUNTY OF MARIN)

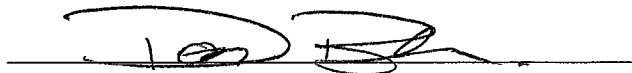
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I am not financially interested in this action and am not a relative or employee of any attorney of the parties, or of any of the parties.

I am the reporter that stenographically recorded the testimony in the foregoing proceeding and the foregoing transcript is a true record of the testimony given.

Dated: APRIL 9, 2012



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